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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which states that those who fail to register as required by the Military Selective Service Act shall be ineligible for assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which also states that those who wish to receive Title IV assistance and who are required to register must file a statement of compliance with their colleges—compels such persons to incriminate themselves in violation of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to the Selective Service System, appellants in both cases include Major General Thomas K. Turnage, the United States Department of Education, and Terrel H. Bell.

In addition to the Minnesota Public Interest Research Group, Inc., the appellees in the first captioned case are individuals using the pseudonyms John Doe, Richard Roe, and Paul Poe.

In addition to the individual employing the pseudonym Bradley Boe, the appellees in the second captioned case are individuals using the pseudonyms Carl Coe and Frank Foe.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court upon issuance of the preliminary injunction (App. A, *infra*, 1a-30a) is reported at 557 F. Supp. 937. The opinion accompanying the permanent injunction (App. B, *infra*, 31a-37a) is not reported.

JURISDICTION

The jurisdiction of the district court was based on 28 U.S.C. (Supp. V) 1331. The judgments of the dis-

trict court (App. C, *infra*, 38a-41a) were entered on June 16, 1983. Notices of appeal (App. D, *infra*, 42a-45a) were filed on June 21, 1983, and June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9, Clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748, provides:

> (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:
>
> "(f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.
>
> "(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to pre-

sent himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purposes."

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

STATEMENT

1. Section 3 of the Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453, empowers the President, by proclamation, to require the registration of every male citizen and male resident alien between the ages of 18 and 26. Its purpose is to facilitate any conscription that may eventually be necessary. See 50 U.S.C. App. 454. Section 12 of the Act, 50 U.S.C. App. (& Supp. V) 462, imposes criminal penalties for violations of the Act, including failure to register. Although draft registration was discontinued in 1975, it was reactivated by President Carter on July 2, 1980. Proclamation No. 4771, 45 Fed. Reg. 45247 (1980).

On September 8, 1982, Congress enacted and the President signed the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* Section 1113 of that Act was passed by an overwhelming bipartisan majority in each house after a full and vigorous debate. See 128 Cong. Rec. S4942-S4945 (daily ed. May 12, 1982); 128 Cong. Rec. H4756-H4772 (daily ed. July 28, 1982). It provides (96 Stat. 748):

> (f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.
>
> (2) In order to receive any grant, loan or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to pre-

> sent himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

Section 1113 directs the Secretary of Education, in agreement with the Director of the Selective Service System, to prescribe methods for verifying the statements of compliance required by subsection (f)(2), and to issue implementing regulations. Those regulations were issued in final form on April 11, 1983. 48 Fed. Reg. 15578 (to be codified at 34 C.F.R. Pt. 668). Section 1113 applies to loans, grants, and work assistance under Title IV of the Higher Education Act of 1965, 20 U.S.C. (& Supp. V) 1070 *et seq.* for periods of instruction beginning after June 30, 1983.[1]

The legislative record shows that Congress enacted Section 1113 in order to encourage registration and to promote a fair allocation of scarce federal aid dol-

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[1] Because of the district court's preliminary and final injunctions, the regulations did not go into effect until Justice Blackman issued a temporary stay on June 24, 1983. On July 6, 1983, the Secretary announced that schools could disburse Title IV aid through July 31, 1983 without first getting Statements of Registration Compliance from recipient students. 48 Fed. Reg. 31175. This was done in order to ease the administrative burden on schools, which could as a result process aid requests in advance of securing the required statement. On July 21, 1983 the Senate voted to extend the grace period (disbursement of aid first, statement of compliance later) from July 31, 1983 through September 30, 1983. 129 Cong. Rec. S10552 (daily ed. July 21, 1983). We are informed that the conference committee considering the Department of Defense Authorization Act of 1984 has agreed to the Senate provision. S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. (1983).

On July 22, 1983, the Secretary extended the grace period through August 31, 1983. 48 Fed. Reg. 33695.

lars by not rewarding those who fail to register. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4758 (remarks of Rep. Solomon); *id.* at H4769 (remarks of Rep. Montgomery); *id.* at H4770 (remarks of Rep. Stratton); 128 Cong. Rec. S4943-4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa); *id.* at S4945 (remarks of Sen. Stennis and Sen. Jepsen). Supporters of Section 1113 emphasized that those who fail to register timely can still qualify for student aid by registering late. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4769 (remarks of Rep. Montgomery); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Stennis). The statement of compliance forms in use accordingly do not require applicants to say *when* they registered. See 48 Fed. Reg. 15582 (1983) (to be codified at 34 C.F.R. 668.25); 129 Cong. Rec. S10544 (daily ed. July 21, 1983).

2. On November 23, 1982, the Minnesota Public Interest Research Group ("MPIRG"), a "college student-directed, nonprofit, Minnesota Corporation" (Complaint, ¶ 3), filed a complaint seeking to enjoin the operation of Section 1113. On January 24, 1983, the district court dismissed MPIRG for lack of standing, but allowed three anonymous students (John Doe, *et al.*) to intervene as plaintiffs. *MPIRG* v. *Selective Service System*, 557 F. Supp. 923 (D. Minn. 1983); *MPIRG* v. *Selective Service System*, 557 F. Supp. 925 (D. Minn. 1983).[2] The intervenors alleged that they reside in Minnesota, that they need financial aid to pursue their education, that they intend to apply for Title IV assistance, and that they are required to register with the Selective Service

[2] Richard Roe, one of the intervenors, has since decided not to apply for federal aid for the 1983-1984 school term (App. B, *infra*, 32a).

System but have failed to do so. Two days later three other anonymous students (Bradley Boe, *et al.*) filed a separate action making essentially the same allegations. The two cases were informally consolidated.

On January 28, 1983, the district court denied appellees' joint motion for a temporary restraining order. On March 9, 1983, the district court preliminarily enjoined appellants from enforcing Section 1113, but allowed them to promulgate regulations pending final disposition of the two lawsuits (App. A, *infra*, 1a-30a). The court ruled that appellees had demonstrated a sufficient threat of irreparable injury because it was "inevitable" that they would "be denied financial assistance and, consequently, the opportunity to pursue their educations" (App. A, *infra*, 5a). The district court also found it likely that appellees would succeed on the merits in showing that Section 1113 ran afoul of the Bill of Attainder Clause and the privilege against compelled self-incrimination.

Concerning the bill of attainder issue, the court said that Section 1113 "clearly singles out an ascertainable group based on past conduct[,]" and "legislatively determines the guilt of this ascertainable group" by "assum[ing] that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements" (App. A, *infra*, 12a). The court identified the affected group as "non-registered students—* * * a group viewed by some as disloyal" (*id.* at 14a). It reasoned that their guilt was "legislatively determine[d]" because all who failed to submit a statement of compliance were automatically denied financial aid (*id.* at 12a). The court also viewed the denial of aid as punishment, because it "deprive[d] students of the practical means to achieve the education necessary to pursue many vocations in our society" (*id.* at 14a). The district court detected a "punitive intent" in the legislative record

(*id.* at 18a), and rejected the government's argument that such an intent was nullified by the fact that nonregistrants could avoid the denial of aid by simply registering late.

Concerning the self-incrimination issue, the district court found that the statement of compliance required by Section 1113 seeks information that "is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant" (App. A, *infra*, 23a). The court believed that appellees were compelled to provide this information because they had "no option of receiving federal financial assistance in another way" (*id.* at 27a). In order to complete their education, the court stated, students are "forced" by Section 1113 "to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status" (*id.* at 28a). In the court's view, the "denial of educational assistance is a sanction that makes assertion of the [Fifth Amendment] privilege costly, thereby compelling self-incrimination" (*ibid.*).

After the district court issued its preliminary injunction, the parties in both cases filed cross-motions for summary judgment and supplemental briefs, which the court took under advisement. On June 16, 1983, the court issued a memorandum order and permanent injunction (App. B, *infra*, 31a-37a) based largely on its opinion of March 9, 1983. The permanent injunction was nationwide in scope (*id.* at 35a, 36a), despite the fact that neither action had been certified as a class action and all the individual plaintiffs were residents of Minnesota (App. A, *infra*, 2a).

On June 29, 1983, this Court stayed the district court's June 16 order pending the timely docketing and final disposition of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

The district court declared unconstitutional and enjoined nationwide the enforcement of a statutory provision designed to encourage maximum compliance with the registration requirements of the Military Selective Service Act and to promote a fair allocation of increasingly scarce federal aid dollars. The court interpreted Section 1113 as barring federal aid to students who did not register in the past, thus violating the Bill of Attainder Clause. But as Congress's debates, the Act's language, and the Secretary's regulations make clear, Section 1113 permits the award of Title IV aid to students who cure their past failure to register by doing so at the time they seek assistance. The court's erroneous construction of Section 1113 also led it erroneously to find the provision in conflict with the Fifth Amendment privilege against compelled self-incrimination.

The order of the district court, if allowed to stand, will discourage compliance with Selective Service registration requirements and reward self-proclaimed lawbreakers. This Court should note probable jurisdiction to review that order and the district court's exercise of "the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

1. Section 1113 is not a bill of attainder forbidden by Article I, Section 9, Clause 3 of the Constitution. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). None of the three definitional elements—specificity in identification, punishment, or lack of a judicial trial—is con-

tained in Section 1113. See *United States* v. *O'Brien*, 391 U.S. 367, 383 n.30 (1968). Because the statute makes benefits available to all qualified students who register at any time before applying, it does not punish any specific group. And because the statute simply dispenses funds from the public treasury on the basis of this rational legislative classification, there is no justification for requiring judicial process to determine eligibility. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 772-774 (1975).

a. Section 1113 does not adversely affect a specific and identifiable group any more than numerous other federal benefit provisions do. A good example is the Veterans' Benefits Act, 38 U.S.C. (& Supp. V) 1501 *et seq.* That Act grants (and withholds) educational benefits to statutorily defined classes in order to encourage service in the Armed Forces. 38 U.S.C. (& Supp. V) 1651, 1661. Section 1113 similarly grants (and withholds) educational benefits in order to encourage registration. In each case one presently ineligible for benefits can collect them by simply satisfying the statutory condition (service or registration). The group denied benefits is thus defined not by past action but on the basis of present and future choice.

Although historically most bills of attainder named the people to whom they were to apply, a legislative act can be an attainder if its targets are particular persons who have engaged in "past and ineradicable actions * * *." *Communist Party* v. *SACB*, 367 U.S. 1, 87 (1961); see *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 319-320 (1867). By contrast, a statute is not an attainder if "[p]resent activity constitutes an operative element to which the statute attaches legal consequences * * *." *Communist Party* v. *SACB*, *supra*, 367 U.S. at 87. The difference is that

in the latter case it is impossible for the legislature to punish "specifically designated persons or groups" (*United States* v. *Brown*, 381 U.S. 437, 447 (1965)), because anyone is free to opt out of the disadvantaged group.[8]

Section 1113 for that reason does not punish any "specifically designated persons or groups." It applies to an individual only if he "fails" to register as required. "[C]onsistent with the statutory intent to encourage registration," see pages 5-6, *supra*, the Secretary has issued regulations permitting "any non-

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[8] In *American Communications Association* v. *Douds*, 339 U.S. 382 (1950), the Court sustained against a bill of attainder challenge Section 9(h) of the National Labor Relations Act, which denied certain benefits of the Act to unions whose officers failed to file affidavits disclaiming membership in the Communist Party. The Court noted that under Section 9(h) "[p]ast conduct * * * is not a bar to" signing the affidavit and obtaining the benefits of the Act (339 U.S. at 414). "[T]here is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit" (*ibid.*). That was, the Court found, the "decisive distinction" (*id.* at 413) from cases like *Cummings*, where "the basis of disqualification was past action or loyalty," and "nothing that those persons proscribed by its terms could ever do would change the result" (*id.* at 414). Cf. *United States* v. *Brown*, *supra*, 381 U.S. at 458 ("Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party.").

Whatever doubt may have been cast by *Brown* upon the validity of the holding in *Douds*, it is clear that this case presents none of the same difficulties. The "alteration of * * * loyalties" required by Section 9(h) of the NLRA entailed the abandonment of conduct that was arguably constitutionally protected. See *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Noto* v. *United States*, 367 U.S. 290 (1961). In this case, by contrast, the action required by Section 1113 is nothing more than performance of the legal duty to register.

registrant who was required to register but did not * * * [to] qualify for aid * * * if he registers with Selective Service and complies with the statement and verification requirements" during the payment period for which he seeks aid. 48 Fed. Reg. 15580, 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)). Ineligibility for Title IV aid is thus "made to turn upon continuingly contemporaneous fact; [it] arise[s] only because, and endure[s] only so long as, and [individual] presently [engages in conduct] of a described character." *Communist Party* v. *SACB*, *supra*, 367 U.S. at 87.

The district court erroneously concluded that students who failed to register within 30 days of their 18th birthday were irrevocably disqualified from receiving Title IV assistance (App. B, *infra*, 33a-34a). That was so, the court said, because Section 1113 requires registration " 'in accordance with any proclamation issued under [Section 3 of the Military Selective Service Act,]' " and Proclamation No. 4771 requires those born after January 1, 1963 to register within 30 days of their 18th birthday (App. B, *infra*, 33a, quoting 96 Stat. 748). The court recognized that the Secretary's regulations permit late registrants to receive aid, but said that in that regard they contradicted the plain meaning of the statute, and so were void (*id.* at 34a) .

But although it is possible to interpret Section 1113 as requiring registration *within the time* fixed by Proclamation No. 4771, it is also possible to read Congress's language ("in accordance with") as simply requiring registration *in the manner* required by any proclamation or regulation.[4] See Proclamation No.

[4] This is not to say that those subject to the Military Selective Service Act are free *for all purposes* to register whenever

4771, 45 Fed. Reg. 45248 (1980) ("Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service."); 32 C.F.R. Pt. 1615 ("Administration of Registration"). This interpretation is supported by the language in subsection (f)(4), also added by Section 1113. Subsection (f)(4) states that the Secretary shall issue regulations providing

> that any person to whom the Secretary of Education proposes to deny assistance * * * for failure to [register] * * * shall be given * * * not less than thirty days * * * to * * * establish[] that he has complied with the registration requirement * * *.

The most natural interpretation of that provision is that nonregistrants may, upon learning of their ineligibility for Title IV aid, still have at least 30 days within which to register and qualify. The Secretary has so interpreted it. See 48 Fed. Reg. 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)(1)). See also *id.* at 15580.

Any other construction of Section 1113 would in fact be perverse. The primary purpose of that section is to encourage registration by those who must register, but have not. To interpret it as unconditionally denying aid to those persons would make it impossible to accomplish that objective. Since this Court's "task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress,

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they please. Although failure to register within the time fixed by Proclamation No. 4771 does not disqualify the registrant for Title IV aid, it is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462. As we advised the district court, however, no registrant has ever been prosecuted for late registration.

so as to comport with constitutional limitations" (*CSC* v. *Letter Carriers*, 413 U.S. 548, 571 (1973)), a proper respect for the work of Congress compels rejection of the district court's reading.

b. Section 1113 also does not inflict "punishment" within the meaning of the Bill of Attainder Clause. "The fact that harm is inflicted by governmental authority does not make it punishment" proscribed by Article I, Section 9. *United States* v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). "Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed" (*ibid.*). But in order to decide whether a statute imposes punishment, thereby bringing it within the potential reach of the Bill of Attainder Clause, a court must determine whether (1) any feature of the challenged statute falls within the historical meaning of legislative punishment, (2) "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes[,]" and (3) "whether the legislative record evidences a congressional intent to punish." *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 475-476, 478.

Section 1113 does not inflict any sanctions that fall within the historical meaning of legislative punishment. The consequence of failure to register is ineligibility for Title IV assistance. But the withholding of such a benefit is not comparable to the sanctions—such as death, imprisonment, banishment, and uncompensated confiscation of property—historically associated with bills of attainder. See *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 473-475. Rather it is—like the withholding of social

security benefits from deportees upheld in *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)—a "mere denial of a noncontractual governmental benefit."

Legitimate and nonpunitive justifications for withholding such aid are readily apparent. Above all, Congress stressed that Section 1113 would encourage those required to register with the Selective Service System to do so. See pages 5-6, *supra*. Conditioning Title IV assistance on registration is a natural means to that end, since the class of individuals seeking student aid overlaps to a great extent the class of those required to register.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce * * * private parties to cooperate voluntarily with federal policy.

Fullilove v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). Section 1113 also promotes a fair allocation of increasingly scarce federal aid dollars by rewarding with Title IV assistance only those students who have performed the legal duty imposed on them by the Military Selective Service Act. See 128 Cong. Rec. S4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa). Finally, Section 1113 directly assists the Selective Service System in its enforcement of the registration requirement of the Military Selective Service Act. The government cannot rely solely on criminal prosecution to enforce registration, any more than it can rely solely on criminal prosecution to enforce other federal laws.

It is legitimate for Congress to devise alternative legislative means, such as Section 1113, to promote maximum compliance with the registration requirement in order to meet the important national defense goals that underlie it. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64-69 (1981).

As we made clear above, pages 5-6, *supra*, the emphasis in the legislative history is on the goal of encouraging registration, not on punishing those who have failed in the past to register. Representative Solomon, the sponsor of the bill, introduced it by saying that "[t]here are some 700,000 young men in this country who have, for the most part, *unintentionally* failed to register" (128 Cong. Rec. H4757 (daily ed. July 28, 1982) (emphasis added)). It is unlikely that Congress wished to inflict harm on a group that it knew consisted largely of innocent nonregistrants. The more natural conclusion—and one amply supported by the debate on Section 1113—is that Congress hoped to offer a reminder and inducement for such people to perform a duty that they had either overlooked or neglected.

c. Given the plainly legitimate purpose behind Section 1113 (encouraging registration) and the obvious rationality of its classification (those who register may receive aid), it is unnecessary to insist on judicial procedures to implement the statute. Such procedures would be appropriate if the purpose of Section 1113 were to assign blame and mete punishment to nonregistrants, since "the legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States* v. *Brown*, *supra*, 381 U.S. at 445. But where there is no showing "of a

'bare congressional desire to harm a politically unpopular group,' * * * appellees['] * * * only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 772 (citation omitted).

Section 1113 assigns no blame to those who have failed to register. On the contrary, at least for purposes of Title IV aid, it excuses even those who have willfully defied the law by allowing them a second chance to comply. The question of blame and punishment for continued nonregistration is reserved for the courts in the context of a criminal prosecution under 50 U.S.C. App. (& Supp. V) 462.

2. The self-incrimination claim raised by appellees and accepted by the district court is frivolous. The primary objective of the privilege against compelled self-incrimination is to "insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). The compulsion requirement "comes directly from the constitutional language directing that no person 'shall be *compelled* in any criminal case to be a witness against himself.'" *South Dakota* v. *Neville*, No. 81-1453 (Feb. 22, 1983), slip op. 9. Absent compulsion, the privilege does not attach. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977); *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966).

Here, there is no compulsion on appellees, for two reasons. In the first place, these cases are unlike all of those relied on by the district court—each of

which involved a summons, subpoena, or other form of legal compulsion to provide information to the government.[6] Appellees, by contrast, have the option of simply not applying for federal aid, and so furnishing no information whatever to the government.

There is a second, and more obvious, reason why appellees are not compelled to incriminate themselves. The district court found that Section 1113 forces them to choose between self-accusation and loss of Title IV aid, and that the threat of deprivation is sufficiently coercive to violate their Fifth Amendment privilege (App. A, *infra*, 27a-28a). But Section 1113 states that one who has not registered is not entitled to Title IV aid at all, whether he advises the government of his failure to register or not. That is a decision which, as we made clear in the last section, Congress is authorized to make. The "compulsion" envisioned by the district court is thus nonexistent, since

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[6] *Ullmann* v. *United States*, 350 U.S. 422 (1956) (grand jury subpoena); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) (subpoena to testify before Waterfront Commission); *Quinn* v. *United States*, 349 U.S. 155 (1955) (summons to testify before congressional committee); *In re Gault*, 387 U.S. 1 (1967) (juvenile defendant); *Hoffman* v. *United States*, 341 U.S. 479 (1951) (grand jury subpoena); *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977) (grand jury subpoena); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (grand jury subpoena); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (Attorney General's inquiry ordered by state supreme court); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (subpoena duces tecum and order to testify at judicial inquiry); *Marchetti* v. *United States*, 390 U.S. 39 (1968) (statutory requirement to register and pay wagering tax); *Leary* v. *United States*, 395 U.S. 6 (1961) (statutory requirement to pay marihuana transfer tax); *California* v. *Byers*, 402 U.S. 424 (1971) (statutory requirement to stop and report car accident); *Albertson* v. *SACB*, 382 U.S. 70 (1965) (statutory registration requirement).

it is inconceivable that anyone is compelled to apply for benefits for which he is ineligible. Appellees are no more forced to choose between self-accusation and loss of Title IV aid than they are forced to choose between self-accusation and loss of Veterans' Benefits; they simply have no right whatever to either form of assistance. If we are correct in believing that Section 1113 is not a bill of attainder, then the district court's Fifth Amendment holding has the untoward effect of enabling appellees to raid the federal treasury for money to which they are not entitled.*

3. Although appellees never requested class certification, the district court's final injunction prohibited appellants from enforcing Section 1113 against any person anywhere in the United States (App. B, *infra*, 35a-36a). This Court, however, has made clear "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 410 (1945). See also *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).

The district court obviously confused the concept of scope of relief with the concept of personal jurisdiction. There is no dispute that where, as here, a district court has personal jurisdiction over a de-

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* We doubt that Congress entertained any intention of requiring applicants for Title IV aid to provide a statement that they had registered with the Selective Service System if registration is not a relevant qualification for Title IV assistance. Thus subsection (f)(2) is not severable from subsection (f)(1); and if we are mistaken in our conviction that the latter is not a bill of attainder, then the statement of compliance requirement would fall as well. The Fifth Amendment issue consequently has no independent significance.

fendant, it has the power to enjoin him from taking action anywhere in the United States against the named plaintiff (*Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932)), or in an appropriate case (see, *e.g.*, *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 376 U.S. 910 (1964)) from taking action against non-parties in order to provide full relief to the parties. But even if a court is reviewing legislation that is "national in character and effect" (App. B, *infra*, 35a), it has no roving commission to correct putatively unconstitutional action wherever it may occur. Its role is limited to taking whatever steps are necessary to provide full relief to those who have invoked its jurisdiction. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803).

Even in the class action context, where a defendant at least enjoys the opportunity of securing a favorable judgment that will bind all members of the plaintiff class, this Court has warned district courts to be cautious in certifying a nationwide class. *Califano* v. *Yamasaki*, *supra*, a case in which the Court approved a nationwide class certification, emphasized the "detrimental effect" that such certification can have in other contexts. 442 U.S. at 702. It is difficult to reconcile this Court's concern in *Yamasaki* with the district court's view that it had equitable authority to issue a nationwide injunction even without class certification.

In these cases, where there has been no class certification, and where no other individuals have sought to join or filed suit elsewhere, there is no basis for nationwide injunctive relief. Of course once this Court has finally passed on the merits of appellees' claims, the issues will be resolved for both the appel-

lants and all present and future nonregistrants. But it is not a district court's place, in a case like this, to usurp that role. If this Court should, for some reason, decline to note probable jurisdiction, the effect would be to insulate against all further review a nationwide determination rendered in a case where it was neither sought nor authorized.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Attorney

AUGUST 1983

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-82 Civ. 1670

JOHN DOE, RICHARD ROE AND PAUL POE,
INTERVENOR-PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

3-83 Civ. 100

BRADLEY BOE, CARL COE AND FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

MEMORANDUM ORDER

This matter comes before the court upon the motions of plaintiffs in these cases for a preliminary injunction enjoining the defendants from enforcing

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) (to be codified at Section 12(f) of the Selective Service Act, 50 U.S.C. App. § 462(f) (1982)) and any regulations promulgated thereunder. Defendants oppose the motions.

Plaintiffs John Doe, Richard Roe, Paul Poe, Bradley Boe, Carl Coe and Frank Foe are all male residents of Minnesota, 19 to 21 years old, subject to Section 3 of the Selective Service Act who intend to apply for financial aid for the 1983-84 school year under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070-1089, who will be unable to complete their educations without financial aid, and who cannot file a truthful statement of compliance with Section 3 and regulations thereunder. Defendant Selective Service System is an agency of the United States. Defendant Major-General Thomas Turnage is the Director of the Selective Service System. Defendant United States Department of Education is an agency of the United States. Defendant Terrel H. Bell is the Secretary of the United States Department of Education.

It is important to note at the outset that these cases involve only a challenge to the constitutionality of Section 1113 linking availability of federal financial assistance under Title IV of the Higher Education Act of 1965 to draft registration. These cases do not challenge the constitutionality of the law requiring registration: the validity of that law has already been upheld by the United States Supreme Court in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). In addition, these cases are not cases in which the propriety of registration versus nonregistration has been raised or argued. Finally, this decision should

not be interpreted as passing on the constitutionality of any law that would deny federal financial assistance to students after conviction for nonregistration. That issue is not before the court. The court turns now to the issues that these cases do raise.

In considering plaintiffs' motions for a preliminary injunction, the court must determine whether or not the standards set forth in *Dataphase Systems, Inc.* v. *C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) have been met. The court in that case held that:

> whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id. at 114.

I. The Threat of Irreparable Harm

Plaintiffs contend that they will suffer irreparable harm if an injunction does not issue. Plaintiffs John Doe and Paul Poe allege that they will be unable to complete their educations without financial aid. Plaintiff Richard Roe alleges that he may be unable to complete his education without financial aid. Plaintiffs Bradley Boe, Carl Coe and Frank Foe similarly allege that they will be unable to complete their educations without financial aid.

Plaintiffs point to the status of education as an important right in our society and allege that deprivation of that right constitutes irreparable harm. The United States Supreme Court in *Plyler* v. *Doe*,

—— U.S. ——, 102 S. Ct. 2382 (1982), declined to find public education a right granted by the Constitution, but did find that education was not merely some governmental benefit indistinguishable from other forms of social welfare legislation. *Id.* at 2397. After noting the importance of education in maintaining our basic institutions, the Court observed that:

> education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. Education has long been recognized as providing the means to "earn an adequate livelihood, to enjoy life to the fullest, [and] to fulfill . . . the duties and responsibilities of good citizens." *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

Plaintiffs contend that deprivation of a post-secondary education, or even delay in attaining that education, and consequent inability to pursue a chosen profession or occupation constitutes harm for which there is no adequate remedy at law. The Supreme Court has upheld a district court's conclusion that even a temporary inability to practice a profession constitutes such harm. *See Withrow* v. *Larkin*, 421 U.S. 35, 44 n.8 (1975).

Defendants contend that plaintiffs have failed to demonstrate a threat of irreparable harm because plaintiffs have not alleged that they have actually

applied for Title IV assistance, qualified for that assistance, and been denied such assistance. Under proposed regulations, most students will not be required to complete a statement of compliance until just prior to the time they actually receive the assistance. Thus, defendants argue, plaintiffs have not substantiated any present or immediately threatened irreparable harm to themselves.

The court is not persuaded by defendants' argument. The application process for financial aid has already begun. As noted in the Memorandum Order, January 24, 1983, § 1113 by its terms imposes a mandatory system linking availability of financial aid to draft registration. It was there pointed out that, "it must therefore be presumed that the Secretary will comply with the mandatory terms of Section 1113, and that implementation of the Section will lead inexorably to the denial of financial assistance, although the exact date of that denial cannot be presently determined." *Id.* at 6. Plaintiffs here allege that they intend to apply for aid, that they will be unable to complete their educations without aid, and that they cannot file a truthful statement of compliance. It is thus inevitable that plaintiffs will be denied financial assistance and, consequently, the opportunity to pursue their educations. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough . . . ." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923)).

Plaintiffs also claim that they are threatened with a second type of irreparable harm. Plaintiffs allege that § 1113 violates their fifth amendment right

against self-incrimination. Plaintiffs argue, first, that the statute penalizes those who assert the fifth amendment by denying them access to Title IV funds, impermissibly burdening the exercise of that privilege, and, second, that the statute's scheme of operation serves to incriminate those who assert the privilege because the very act of applying can lead directly or indirectly to incriminating evidence.

Defendants again maintain that plaintiffs have failed to establish a threat of irreparable harm. According to defendants, plaintiffs cannot establish that any action that poses an immediate danger to their fifth amendment rights has been taken against them. Plaintiffs do not claim that they need a preliminary injunction in order to decide whether to apply for Title IV funds, defendants argue. Furthermore, plaintiffs will not be required to submit a statement of compliance until much later in the application process.

The court finds defendants' arguments unconvincing. Many unregistered students, including plaintiffs, are faced with the choice *now* of waiving their right against self-incrimination by beginning an aid application process that will inevitably require them to furnish proof of registration or, alternatively, of foregoing financial assistance to avoid self-incrimination. Educational institutions have traditionally imposed deadlines for aid applications that precede the actual awarding of funds by several months. The University of Minnesota, which plaintiffs Doe, Poe and Roe plan to attend, last year set a deadline of March 1, 1982 for applications for the 1982-83 school year. No such deadline has been set for the current year, apparently because of these actions, but at some point an application in practical effect is too late. In

addition, some schools and universities are requiring students to certify compliance with registration requirements at the time of application. Defendants acknowledge that since final regulations may not be published until late this spring, many students will be anxious to know at the earliest opportunity whether and to what extent they will receive benefits. Defendants surmise that institutions "may have decided to *request* that students voluntarily supply registration information at the time they apply . . . . Indeed, the Secretary has encouraged institutions to do this." *See* defendants' "Statement of Points and Authorities in Opposition to Plaintiffs' Motion for a Preliminary Injunction," at 7, n.1. Thus, students at such colleges must either "voluntarily" supply potentially incriminating information or forego financial aid.

Plaintiffs in these cases are nonregistrants who would like to apply for financial aid but cannot do so without allegedly infringing their fifth amendment rights against self-incrimination. Although plaintiffs need not make their choice at this exact point in time, the dilemma they face is inevitable. Thus, they have clearly shown that they face the *threat* of irreparable harm. The court finds that plaintiffs have met the first of the four *Dataphase* standards.

II. Balancing

The second *Dataphase* standard requires the court to balance the threat of harm to the movant with the injury that granting the injunction would inflict on the other parties.

Defendants argue that granting an injunction would impair their ability to implement and enforce

§ 1113 in two ways: first, a freeze on the regulatory process would impair the ability of the Secretary of Education to issue final implementing regulations on time; and second, the Secretary would have to decide whether to halt final processing of applications until the injunction was lifted or to allow processing to go forward, making all awards subject to later recoupment.

Plaintiffs contend that it would be senseless to delay their relief in order to permit the government to issue regulations for the implementation of an unconstitutional act. Plaintiffs further argue that since the government has adequate mechanisms for enforcing violations of the registration requirement, the defendants will not be injured by issuance of the injunction.

The court agrees with defendants that they may suffer some administrative inconvenience and delay in implementing final regulations if an injunction halting all action by the government issues. The court, however, finds that the threat of irreparable harm to plaintiffs far outweighs any potential injury to defendants. Furthermore, a properly framed injunction could allow defendants to proceed through publication of final regulations but could prohibit any action by defendants to enforce those regulations pending final disposition of these lawsuits.

III. Probability of Success on the Merits

The third *Dataphase* factor involves consideration of the probability that the movant will succeed on the merits. Plaintiffs are not required to prove a greater than fifty percent likelihood that they will prevail on the merits. *Dataphase*, 640 F.2d at 113. The court there warned against a wooden application of the probability test saying:

> [T]he court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. . . . [W]here the balance of other factors tips decidedly toward movant a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.

Id. With this standard in mind, the court now examines plaintiffs' challenges to § 1113.

A. Bill of Attainder

Plaintiffs allege that § 1113 is a bill of attainder in violation of U.S. Const. art. I, § 9, cl. 3. A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual or group without the protections of a judicial trial. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977).[1] The writings of the framers of our Constitution indicate that the "Bill of Attainder Clause was not intended as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function . . . ." *United States* v. *Brown*, 381 U.S. 437, 442 (1965).

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[1] Historically the bill of attainder was a parliamentary act sentencing one or more persons to death used in England against persons who threatened to or attempted to overthrow the government. In addition to the death sentence, the attained party's heirs could not inherit his property. The "bill of pains and penalties" was similar but its penalty was less than death, *e.g.*, banishment or deprivation of the right to vote. Most bills of both types named the parties to whom they applied, but a few merely described them.

> Thus the Bill of Attainder clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.

Id. at 445.

The Supreme Court has avoided construing the clause narrowly and instead has read it in light of the evil it was intended to bar. The Court has struck down, for example, as a bill of attainder: an amendment to the Missouri Constitution that provided no one could engage in a number of specified professions unless he first swore he had taken no part in the rebellion against the Union, *Cummings* v. *Missouri*, 71 U.S. (4 Wall) 277 (1867); a federal statute that required attorneys to take a similar oath before they could practice in federal courts, *Ex parte Garland*, 71 U.S. (4 Wall) 333 (1867); § 304 of the Urgent Deficiency Appropriation Act, 1943, which prohibited payment of further salary by the government to three named federal employees, *United States* v. *Lovett*, 328 U.S. 303 (1946); and § 504 of the Labor-Management Reporting & Disclosure Act prohibiting members of the Communist Party from holding union office, *United States* v. *Brown*, 381 U.S. 437 (1965).

Plaintiffs contend that the statute in question is directed at a specific group of persons, *i.e.*, young male students who require financial aid but cannot complete truthful statements of compliance. Defendants argue that § 1113 does not attach to specifically designated persons or groups because it does not describe persons in terms of *past conduct* but only present and

future actions, citing *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 86 (1961). Since the act is not intended to punish a class of persons who committed the past act of nonregistration and who can do nothing about it now, but instead to regulate the present and future conduct of those who wish to receive Title IV assistance, defendants contend, it is not a bill of attainder. Those who committed the past act of nonregistration could become eligible for funding by registering now.

Defendants' argument is not tenable. The Supreme Court soundly rejected the same argument over 100 years ago. In *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867), defendant argued that plaintiff could escape the bill's prohibitions presumably by making the required loyalty oath and that the bill was only intended to regulate the present and future conduct of those who wished to practice particular professions in Missouri. *Id.* at 297, 294. The Supreme Court nonetheless held that the amendment was a bill of attainder that inflicted punishment based on the past act of affiliation with the Confederacy. *Id.* at 320.[2]

Similarly, § 1113 bears no relationship to bona fide qualifications for educational funding but instead ap-

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[2] The Court held that:

> [The clauses in the Missouri constitution] assume that there are persons in Missouri who are guilty of some of the acts designated . . . . *They are aimed at past acts, and not future acts.* They were intended especially to operate upon parties who . . . had aided or countenanced the Rebellion . . .; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their . . . avocations. *This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath.*

Cummings, 71 U.S. (4 Wall) at 327 (emphasis added).

pears to be intended to reach the past act of nonregistration. To say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement; it also ignores the fact that males born after January 1, 1963 must register *within 30 days* of their eighteenth birthday or be subjected to prosecution for late registration. Section 1113 clearly singles out an ascertainable group based on past conduct.

Plaintiffs further allege that § 1113 legislatively determines the guilt of this ascertainable group. Draft-age male students who fail to submit the statement of compliance are automatically denied financial aid, regardless of whether their nonregistration is intentional or innocent. The section thus assumes that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements. Plaintiffs argue that a student may reasonably but mistakenly believe he is exempt from registration under one of the exemption categories; he would then be a nonregistrant but would not possess the specific intent required to punish him for the criminal offense of nonregistration under § 12 of the Military Selective Service Act, 50 U.S.C. App. § 462 (1981).

Plaintiffs also allege that the section inflicts punishment. The Supreme Court in *Nixon* v *Administrator of General Services*, 433 U.S. 425 (1977) employed a three-part test to determine whether the act in question there constituted punishment.[3] That same test can be applied to § 1113 in these cases. First, the Court looked to a historical list of legisla-

[3] The Court in that case found the act did not inflict punishment.

tive punishments. The Court found that common punishments were imprisonment, banishment, and punitive confiscation of property. The Court noted that our own country's experience added another sanction to the list of impermisible legislative punishments: "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal." *Id.* at 474.

In the cases at hand, plaintiffs urge that § 1113 deprives students of the means to attend institutions of higher education and therefore effectively deprives them of the opportunity to pursue chosen careers. Plaintiffs point to *Cummings* where the Court said:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . . . Disqualification from the pursuits of a lawful avocation . . . has been imposed as punishment. . . . .
>
> The theory upon which our political institutions rest is, that all [persons] have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, ... Any deprivation or suspension of any of these rights for past conduct is punishment, ...

Cummings, 71 U.S. (4 Wall) at 320, 321-22.

Defendants, on the other hand, contend that denial of financial aid does not compare to any of the sanctions historically associated with bills of attainder. The fact that harm is inflicted by governmental authority does not make it punishment. *United States*

v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). Defendants argue that withholding federal assistance under Title IV is like the withholding of social security benefits from deportees illegally in this country that the Supreme Court upheld in *Flemming* v. *Nestor*, 363 U.S. 603 (1960). In that case, the Court held that the sanction was the "mere denial of a noncontractual governmental benefit", *id.* at 617, and imposed no affirmative disability or restraint. Thus, defendants urge, § 1113 does not impose any punishment by withholding a benefit and cannot be classified as a bill of attainder.

The court is not persuaded by defendants' argument. While denial of federal financial aid is not a historical punishment, the court is not strictly confined to those sanctions that have been deemed punishment in the past. *See Nixon*, 433 U.S. at 475. If the statute in question prohibited students who could not prove they had registered for the draft from entering specific professions, *Cummings* would clearly dictate that the law be declared unconstitutional. If the statute instead prohibited those students from attending any institution of higher education, the deprivation's punitive character would also be obvious. The fact that the challenged statute deprives students of the practical means to achieve the education necessary to pursue many vocations in our society means only that the congressional means of effecting the deprivation is less direct; the statute's result is still to punish students who cannot prove their innocence. In addition, the group affected—nonregistered students—is a group viewed by some as disloyal, just as those who had aided the confederacy were thought to be disloyal in post-Civil War times and just as Communists were thought to be disloyal

in the Cold War era. *See, e.g., Cummings*, 71 U.S. (4 Wall) 277 (1867); *United States* v. *Brown*, 381 U.S. 437 (1965). Considering the importance of the opportunity to seek a college education in these times, deprivation of that opportunity based on past conduct of a group deemed to be disloyal seems to this court to be punishment.

Fleming v. *Nestor* does not mandate a different conclusion. In this court's view, it was not the characterization of the sanction as a "mere denial of a noncontractual governmental benefit" that dictated the Supreme Court's conclusion. Instead of engaging in semantic exercises similar to the "right" versus "privilege" discussions in the due process cases, the Court focused on whether the statute evinced a punitive purpose. The Court found that, "It is impossible to find in this meagre [legislative] history the unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down." *Id.* at 619. Thus, the government's emphasis on the denial of financial aid as a denial of a mere benefit is misplaced.

The second element of the *Nixon* three-part test is a functional one. The Court in that case analyzed whether the law, viewed in terms of the type and severity of burdens imposed, reasonably could be said to further nonpunitive legislative purposes. Previous cases had listed a number of factors to use in a functional analysis, among them: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether it promotes the traditional aims of punishment, whether the behavior to which it applies is already a crime, whether it has a rational alterna-

tive purpose, and whether it appears excessive in relation to that purpose. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

Plaintiffs claim that § 1113 acts as both a disability and restraint, that deprivation of benefits previously enjoyed has historically been regarded as punishment, that the law assumes nonregistrants possess guilty intent, that the law promotes the traditional aims of punishment by imposing retribution for past failure to register and by deterring future noncompliance, that the behavior it applies to is already a criminal offense under § 12 of the Selective Service Act, 50 U.S.C. App. § 462 (1981), that it has no rational educational purpose, and that it is excessively broad because it applies to those who have inadvertently failed to register as well as to those who have intentionally failed to register.

Defendants claim that the law passes the functional test because its rational nonpunitive purposes are (a) to encourage compliance with registration laws, (b) to promote a just allocation of scarce aid dollars, and (c) to assist the Selective Service in its enforcement of the draft registration laws.

The court believes that § 1113 fails the functional test. It imposes both a restraint and disability, assumes nonregistrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes. The court is also not persuaded that the purposes defendants allege are really alternative: under defendants' theory that the law does not punish nonregistration but encourages registration, every "punishment" could be renamed an "encouragement" thereby escaping the Constitution's proscription on bills of attainder.

The third part of the *Nixon* three-part test is a motivational test inquiring whether the legislative record evinces a congressional intent to punish. 433 U.S. at 478. Plaintiffs allege that Congress clearly intended to punish nonregistrants by making them ineligible for federal financial aid. The bill's sponsor in the House, Representative Solomon, introduced the bill with the following language:

> There are some 700,000 young men in this country who have, for the most part, unintentionally failed to register, and I intend not only to offer this amendment to this legislation, but as other legislation comes down the pike, such as the jobs training bill, such as home loans . . . , I intend to offer the same amendment *until every young man is deprived of Federal assistance unless he has obeyed the law. . . .*

128 *Cong. Rec.* H4757 (daily ed. July 28, 1982) (emphasis added). Other floor speakers evinced a similar punitive intent.[4] Representive Edgar in speaking against the bill said: "This amendment has the obvious primary objective of increasing the number of men registered . . . . *However, it also has a secondary, and more subtle, objective, which is to punish those individuals who do not register. Id.* at 4760 (emphasis added). Representative Goldwater observed that a nonregistrant "not only stands the chance of going to jail, but he also stands the chance

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[4] Representative Mitchell, for example, said, "If young men do not think enough of their country to register to defend it, I do not see any reason at all why they should get benefits from that country." *Id.* Representative Montgomery noted, "[I]t is a felony, they have violated the law, and they are not entitled to these educational benefits." *Id.*

of not receiving financial assistance for education, *which is just as harsh a penalty in terms of the boy's future.*" *Id.* at 4761 (emphasis added). Other speakers pointed to the apparent unfairness to those who had registered of allowing nonregistrants to receive loans. The intent to legislatively determine guilt and inflict punishment, plaintiffs contend, is clear.

Defendants argue that Congress intended to encourage compliance with registration, not to punish nonregistrants. It is true that the record of congressional debate contains statements that the bill's purpose is to encourage compliance. 128 *Cong. Rec.* S4943 (daily ed. May 12, 1982) (statement of Sen. Hayakawa); *id.* at 4945 (statement of Sen. Jepsen). A thorough examination of the context of those statements, however, clearly reveals a punitive intent. Senator Hayakawa who sponsored the Senate bill said, "It is a real travesty when those who will not register can turn around and apply for . . . educational benefits . . . . This [bill is] an important signal to every American that *this Congress will not tolerate any willful, blatant rejection of the responsibilities* which come with living in a free nation." *Id.* at 4944 (emphasis added).[6] Only Senator Durenberger spoke against the bill in the Senate, arguing that criminal sanctions already provided the means by which to punish nonregistrants and calling the measure a case of overkill. *Id.*

In summary, the record in both houses of Congress shows an obvious intent to punish nonregistrants. Even the addition of an intent to encourage compli-

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[6] *See also* statement of Senator Tower, "I do not know why anyone should be permitted to claim the benefits . . . financed [by] the taxpayers of this country if they are not prepared simply to register . . . ." *Id.* at 4945.

ance with registration cannot save this law: deterrence of future wrongdoing is a traditional punitive aim. As the court has already observed, under defendant's view, each statute punishing one act could be recast as encouraging another act, thereby escaping scrutiny. Such an interpretation would render our Constitution's prohibition on bills of attainder meaningless.

The court concludes that plaintiffs have shown a probability of success on the merits of their claim that § 1113 legislatively determines the guilt of and inflicts punishment on an identifiable group without the protections of a judicial trial. This court therefore finds that plaintiffs have demonstrated a probability of success on the merits of their claim that § 1113 constitutes a bill of attainder in violation of art. I, § 9, cl. 3 of the United States Constitution.

B. Fifth Amendment

Plaintiffs also allege that § 1113 violates their fifth amendment privilege against self-incrimination. The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself . . . ." The fifth amendment has been characterized as an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956) (quoting *Griswold, The Fifth Amendment Today* (1955) 7). The policies underlying the amendment have been expressed as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel

> trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitional system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (citations omitted). This important constitutional protection has been interpreted liberally, in keeping with the amendment's spirit. *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956); *Quinn* v. *United States*, 349 U.S. 155, 162 (1955).

While the amendment by its terms applies to criminal cases, it is clear that the "privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory" *Murphy*, 378 U.S. at 94 (White, J., concurring). The availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but on the nature of the statement and the exposure it invites. *In Re Gault*, 387 U.S. 1, 49 (1967) (hold-

ing that privilege is available in juvenile delinquency proceedings).[6]

The privilege extends not only to information that would in itself be incriminating, but also to answers that would furnish a link in the chain of evidence to prosecute. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951). The privilege protects any disclosures that the witness may reasonably apprehend could be used in a criminal prosecution or could lead to other evidence that might be used to prosecute. *Murphy*, 378 U.S. at 94 (White, J., concurring).

Plaintiffs contend that § 1113 violates the fifth amendment in two ways: first, the statute penalizes those who assert the privilege by denying them access to Title IV funds, impermissibly burdening exercise of the privilege; and second, the statute's scheme of operation serves to incriminate those who chose to assert the privilege. Plaintiffs argue that denial of federal financial assistance to those students who assert their fifth amendment privilege is an impermissible burden on exercise of that privilege. Plaintiffs point to a series of Supreme Court cases in which denial of various rights for asserting the privilege has been invalidated. *See, e.g., Lefkowitz* v. *Cunningham*, 431 U.S. 801, (1977) (divesting political officeholder of his office and imposing a five-year ban on

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[6] *See also Lefkowitz* v. *Turley*, 414 U.S. 70, 78 (1973), holding that the privilege was available in the context of an official inquiry into the job performance of a public contractor.

holding any public or party office for refusal to waive his constitutional immunity in a grand jury investigation of his conduct held unconstitutional); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (denying public contractors the right to contract with the government for five years upon their refusal to sign waivers of immunity held unconstitutional; *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (requiring police officers in an inquiry by the state attorney general concerning the fixing of traffic tickets to respond to questions or face removal from office held unconstitutional); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (disbarring a lawyer for failure to honor a *subpoena duces tecum* and to testify at the judicial inquiry held unconstitutional).

Plaintiffs also contend that the statute's scheme of operation incriminates those students who assert the privilege. Any student who provides a false statement of compliance will subject himself to prosecution for perjury. 20 U.S.C. § 1097 (1982). Nonregistration is also a criminal offense. 50 U.S.C. App. § 462 (1981). In addition, the statute provides that the Secretary of Education, in agreement with the Director of the Selective Service, will prescribe methods for verifying statements of compliance. "Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance." Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1113(f)(3), 96 Stat. 748 (1982) (to be codified at 50 U.S.C. § 462(f)). Plaintiffs argue that the Selective Service System will be put on notice that a student is in violation of the law once a student asserts his fifth amendment privilege.

Defendants contend that § 1113 does not violate the fifth amendment because students are not *compelled* to provide incriminating information. Where an individual retains a bona fide, voluntary choice whether to furnish information to the government, defendants maintain, the privilege does not attach. Defendants say that plaintiffs may choose not to apply for Title IV assistance and that the economic consequences of that decision do not change its voluntary nature.

The court finds that plaintiffs have demonstrated a probability of success on the merits of their claim that § 1113 violates the fifth amendment's protection against self-incrimination. The amendment's protection extends to administrative proceedings like the one envisioned by this statute. *See* cases cited at 20, *supra*. The information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant. In *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 77 (1965), petitioners were Communist Party members who had been ordered to register and had failed to do so. The Court found that the risks of incrimination to petitioners by registering were obvious. The form required an admission of membership in the Communist Party; that admission could be used to prosecute the registrant under at least two federal criminal statutes.

The central standard for the application of the privilege has been "whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968). Petitioner in *Marchetti* was convicted for evading payment of an occupational tax on wagers and for failure to comply with a statute requiring those liable for the tax

to register and to supply detailed information on forms to the Internal Revenue Service. The statute required the IRS to provide to prosecuting officers a list of those who had paid the occupational tax. Petitioner contended that the statute violated the fifth amendment. The Court agreed with petitioner and found that he was confronted by a comprehensive system of prohibitions on wagering, yet was required to provide information that he might reasonably suppose would be available to prosecuting authorities and that would surely prove a significant link in a chain of evidence tending to establish his guilt. Wagering, the Court said, was an area permeated with criminal statutes and those engaged in wagering were a group inherently suspect of criminal activities. *Id.* at 47. *See also Leary* v. *United States*, 395 U.S. 6 (1969). *But see California* v. *Byers*, 402 U.S. 424 (1971).

In the cases at hand, plaintiffs must identify themselves in the Title IV aid application process as nonregistrants under the Selective Service System's registration requirements. The law allows this information to be provided to the Director of the Selective Service System and directs that the Director work with the Secretary of Education to verify compliance statements. While the government has adopted a "passive enforcement" system under which identities of nonregistrants are not actively sought, it appears that the Service expects to implement soon an "active" enforcement program based on access to Social Security records.[7] *United States* v. *Eklund*, Cr. No.

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[7] *See* 50 U.S.C. App. § 462(e) (1981) allowing the President to require the Secretary of Health and Human Services to furnish various information to the Director, including names, addresses and social security numbers.

82-77, memorandum opinion at 4 (S.D. Iowa Nov. 29, 1982). It takes no great stretch of the imagination to discern how plaintiffs' identification of themselves as nonregistrants could incriminate them or provide a significant link in the chain of evidence tending to establish their guilt.

The court also believes that the information required by § 1113 is compelled. Defendants' argument that plaintiffs can "choose" not to apply for benefits, thereby avoiding a fifth amendment problem, has been consistently rejected by the Supreme Court. In *Marchetti* v. *United States*, 390 U.S. 39 (1968), the Court discussed *Lewis* v. *United States*, 348 U.S. 419 (1955), which had held that an occupational tax on wagering did not violate the fifth amendment because it merely imposed on the gambler the initial choice of whether he wished to gamble. The gambler need not register or pay the tax if he ceased to gamble. The Court in *Marchetti* found that reasoning no longer persuasive. "The question is not whether petitioner holds a 'right' to violate state [wagering] law, but whether, having done so, he may be compelled to give evidence against himself." *Marchetti*, 390 U.S. at 51.

As the Court in *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967) noted "where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." The Court held in that case that threatened loss of employment for refusal to speak in an attorney general's investigation constituted compulsion. *Id.* at 497. In *Spevack* v. *Klein*, 385 U.S. 511, 514 (1967), the Court said that the fifth amendment grants to a person the right to remain silent until he chooses to speak in the unfettered exercise of his own will and to suffer no

penalty for such silence. A penalty, the Court said, is "the imposition of any sanction which makes assertion of the . . . privilege 'costly.' " *Id.* at 515. In that case, the threat of disbarment, the loss of professional standing, and loss of livelihood were held to be powerful forms of compulsion to make a lawyer relinquish the privilege. Loss of political office and of the right to contract with the government have also been held to constitute compulsion. *See Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

Contrary to defendants' implication in this case, economic consequences are relevant in assessing the presence of compulsion. In *Lefkowitz* v. *Cunningham*, 431 U.S. at 806-07, the Court observed that while earlier cases were concerned with penalties having a substantial economic impact, "the touchstone of the Fifth Amendment is compulsion, and *direct economic sanctions* and imprisonment are *not the only penalties* capable of forcing the self-incrimination . . .." (emphasis added.) The Court then interpreted the amendment's protection broadly by finding threatened loss of a powerful political office and diminished reputation inherently coercive. The Court buttressed those consequences with a finding of grave economic consequence.

The cases defendants rely on for the propositions that the privilege does not attach absent compulsion and that filing for financial aid is voluntary are distinguishable.[8] It is true that the Eighth Circuit in

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[8] *Andresen* v. *United States*, 427 U.S. 463 (1976) involved seizure of plaintiff's business records; plaintiff was never required to say anything, the records were seized by law enforcement personnel, and they were authenticated by prosecution witnesses, not the petitioner. The Court said the fifth amend-

United States v. *Warinner*, 607 F.2d 210 (1979), *cert. denied*, 445 U.S. 927 (1980) found that filing a W4E form was a voluntary act. The court noted that the taxpayer was not obliged to file the form but could have filed a different form, paid his tax and then filed for a refund. Loss of use of the money during that time was not sufficient to change the essentially voluntary nature of the act.

In contrast, plaintiffs here have no option of receiving federal financial assistance in another way. To receive the assistance they need to attend a college or university for the 1983-84 school year under any of the programs funded by Title IV, they must file a statement of compliance. Students who cannot complete their educations without such assistance have no more "choice" whether to file than did the gambler who could "choose" not to gamble. While such students concededly are not being summoned by grand juries or attorney generals' investigations, as were

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ment adheres to the person, not to information that may incriminate him. *Id.* at 473. At the time the records were made, petitioner was not subject to the cruel trilemma of self-accusation, perjury or contempt.

Fisher v. *United States*, 425 U.S. 391 (1976) is also inapposite. In that case, the Court said enforcing summonses against taxpayers' *lawyers* did not violate the fifth amendment because they did not compel the *taxpayers* to do anything. The Court said it had held repeatedly that the fifth amendment is limited to protecting compulsion exerted on the person asserting the privilege. *Id.* at 397.

Diebold v. *Civil Service Commission*, 611 F.2d 697 (8th Cir. 1979), relied on by defendants, is also easily distinguishable. In that case, plaintiff offered no proof that he would be penalized for invoking the fifth amendment or even that he would be required to testify. There was simply no evidence that he would be faced with the dilemma of surrendering his job or his privilege. *Id.* at 700.

persons in many of the Supreme Court cases finding compulsion, students who need financial assistance are forced to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status. As the court discussed in part I, *supra*, denial of the opportunity to pursue one's education and chosen vocation is a severe penalty in this society. It is this court's opinion that denial of educational assistance is a sanction that makes assertion of the privilege costly, thereby compelling self-incrimination.

Defendants also rely on *Field* v. *Brown*, 610 F.2d 981 (D.C. Cir. 1979), where regulations requiring retired military officers to file a form saying they were not engaged in sales to the armed services were upheld against fifth amendment challenges. No criminal penalties would follow failure to file, but an investigation for conflict of interest would normally result when the form was not filed. That investigation could develop evidence of criminal conduct. While the form provided information that enabled authorities to reduce pension payments to retirees already holding federal employment, that function was characterized as a regulatory one. The court said that retired regular officers were a distinguished and honorable class, not a highly selective group inherently suspect of criminal activities. Retired officers had a bona fide, voluntary choice whether to complete the form or not.

The court finds that the cases at hand are distinguishable. Section 1113 does not apply even-handedly to all members of a distinguished group but instead is directed at a small group of likely violators. While not all nonregistrants are college students, among young male college students there are likely to be a

number of nonregistrants. Like the gambler in *Marchetti*, a nonregistrant college student who applies for aid must unmistakably identify himself as a nonregistrant. In addition, the court is not persuaded that *Field* was correctly decided. The withholding of retirement pay and referral of the matter to other federal agencies seem to be penalties on the exercise of the privilege. The fact that the government already had the authority to investigate does not make the information compelled less incriminating: "The judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of the interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment . . .." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 81 (1965).

In summary, the court finds that plaintiffs have demonstrated a probability of success on the merits of their claim that § 1113 violates the fifth amendment privilege against self-incrimination.

The court finds it unnecessary to decide whether the challenged statute violates the equal protection component of the fifth amendment's due process clause. The court also does not reach the merits of the Privacy Act and Presidential Proclamation claims.

IV. The Public Interest

The fourth *Dataphase* factor to consider in deciding whether to issue a preliminary injunction is the public interest. The court has already determined that plaintiffs have demonstrated a probability of success on the merits of their challenge to the law's constitutionality. Enforcement of a law likely to be found unconstitutional is not in the public interest.

The court finds that the public interest weighs in favor of the issuance of the preliminary injunction sought by plaintiffs.

Neither the court's ultimate conclusion that a preliminary injunction will issue nor anything set forth in this opinion should be construed as condoning noncompliance with the valid draft registration law of this nation, nor as affording solace to those who willfully violate that law by failing to register. On the contrary, this court is firmly of the opinion that those persons subject to the draft registration law owe their country a legal duty to comply with that law in all respects. The issue here before the court turns not on whether the registration law should be enforced, but in what manner. The Military Selective Service Act, 50 U.S.C. App. § 462 (1981), provides for a maximum penalty of five years in prison and/or a $10,000 fine for those convicted of violating its provisions. No doubt, as with the other criminal statutes of this nation, the Department of Justice and the United States attorneys will vigorously enforce the registration act and appropriate sentences will be imposed upon those who are convicted of willful violation of that law.

Accordingly,

IT IS ORDERED That plaintiffs' motions for a preliminary injunction are granted.

IT IS FURTHER ORDERED That an injunction issue, without security therefor, in the form attached hereto.

DATED: March 9, 1983.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-82 Civ. 1670

JOHN DOE, RICHARD DOE and PAUL POE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

3-83 Civ. 100

BRADLEY BOE, CARL COE and FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

MEMORANDUM ORDER

This matter comes before the court upon cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs' motions for a preliminary in-

junction enjoining defendants from enforcing Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) were granted by memorandum order of this court on March 9, 1983. No appeal from that order was taken by defendants. Plaintiffs John Doe, Richard Roe and Paul Poe moved for summary judgment and for a permanent injunction on March 18, 1983. Although plaintiff Richard Roe no longer intends to apply for assistance for the 1983-84 term, plaintiffs John Doe and Paul Poe do intend to do so and, thus, two of the plaintiffs do have standing. Plaintiffs Bradley Boe, Carl Coe and Frank Foe filed an untimely motion for summary judgment on February 1, 1983 and a renewed motion for summary judgment on May 23, 1983. Defendants moved for summary judgment on April 18, 1983.

All parties agree that there exist no issues of material fact. *See* "Motion by Intervenor-Plaintiffs for Summary Judgment and Permanent Injunction" at 2; ["]Plaintiffs' Renewed Motion for Summary Judgment" at 1; and "Defendants' Motion for Summary Judgment" at 1. Thus, the cases are appropriate for summary disposition. *Scherr Construction Company* v. *Greater Huron Development Corporation*, 700 F.2d 463 (8th Cir. 1983). Based upon all files, records and proceedings herein, the memoranda of counsel, the findings and reasons contained in this court's memorandum order dated March 9, 1983 which is incorporated herein by reference and the reasons that follow, plaintiffs' motions will be granted and defendants' motion will be denied.

The outcome of these cases depends upon resolution of the constitutionality of Section 1113. The court in its March 9, 1983 memorandum order found

that plaintiffs had shown a probability of success on the merits of their claims that § 1113 constitutes a bill of attainder in violation of art. 1, § 9, cl. 3 of the United States Constitution and also violates the Fifth Amendment privilege against self-incrimination. The court did not reach the equal protection, Privacy Act and Presidential Proclamation claims. While defendants have referred the court to additional case authority on the issues, they rely on esesntially the same arguments presented in their opposition to issuance of a preliminary injunction. The court did not find those arguments to be persuasive then and does not find them to be so now. The court will address briefly the additional arguments advanced by the defendants.

Defendants contend that § 1113 is not an unconstitutional bill of attainder because the implementing regulations to § 1113 allow students who have not previously registered to become eligible for Title IV benefits by registering. *See* 48 Fed. Reg. 15580, 15583 (1983) (to be codified at 34 C.F.R. 668, 72 (b)). Section 1113, however, unequivocably provides that students who are required to register under § 3 of the Military Selective Service Act and who fail to do so "in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section" shall be ineligible for any Title IV assistance or benefits. The presidential proclamation to § 3 requires that persons born on or after January 1, 1963 present themselves for registration on their eighteenth birthday or on any day within the period of 60 days beginning 30 days before that date. *See* Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980). Notwithstanding the implementing regulations, students cannot register more than 30 days after their eighteenth birthday

without violating § 3 and § 1113 and facing possible criminal prosecution. To the extent that the regulations contradict the plain meaning of the statute, they are void. It is clear to this court that § 1113 determines guilt and inflicts punishment on an identifiable group based on the past act of nonregistration without the protections of a judicial trial. For the reasons discussed above and in this court's March 9, 1983 order, the court holds that § 1113 constitutes an unconstitutional bill of attainder.

Defendants further argue that *South Dakota* v. *Neville*, —— U.S. ——, 103 S. Ct. 916 (1983) requires the court to find that § 1113 does not violate the Fifth Amendment privilege against self-incrimination. *Neville*, however, depended in part on the fact that under *Schmerber* v. *California*, 384 U.S. 757 (1966), the state could legitimately compel a suspect, against his or her will, to take a blood-alcohol test. The Supreme Court in *Neville* reasoned that offering the suspect the option of refusing the test with attendant penalties for that choice was thus not coercive and not protected by the privilege against self-incrimination. *Neville*, 103 S. Ct. at 923. The Supreme Court specifically observed that this was not a case where the state had "subtly coerced respondent into choosing the option it had no right to compel." *Id.* In contrast, the government here does not contend that it could directly compel draft-age males to provide evidence of their registration status under § 3. The government clearly would have no right to do so. The government does contend, however, that it can indirectly compel draft-age male students to provide evidence of their registration status under § 1113 by withholding Title IV assistance. As the court explained in its March 9, 1983 order, the option

presented by § 1113 is one the government has no right to compel. The court also agrees with plaintiffs that *Neville* is distinguishable from the cases at hand. For the reasons discussed above and in this court's March 9, 1983 order, the court finds that § 1113 violates the Fifth Amendment privilege against self-incrimination.

Defendants finally maintain that any injunction granted should be limited to the federal district of Minnesota on the theory that an injunction beyond that geographic area would be of no benefit to these individual plaintiffs. As the Supreme Court stated in *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), "the scope of injunctive relief as dictated by the extent of the violation established, not by the geographical extent of the plaintiff[s]." In these cases, the court has personal jurisdiction over defendants and the court's injunction therefore binds them throughout the United States. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932); *State of New York* v. *Schweiker*, 83 Civ. 0726 (S.D.N.Y. March 7, 1983). *See also Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); *National Welfare Rights Organization* v. *Weinberger*, 377 F. Supp. 861 (D.D.C. 1974). These cases involve challenges to the constitutionality of § 1113 on its face. The legislation is national in character and effect. It seems to this court that the public interest lies in favor of resolving promptly the issues raised by these cases. Furthermore, any injunction limited to the geographic area of Minnesota would allow defendants to enforce outside the district of Minnesota a statute that this court has found to be unconstitutional on two grounds. Such an anomalous result should be avoided.

Upon the foregoing,

IT IS ORDERED That plaintiffs' motions for summary judgment be and hereby are granted, and defendants' motion for summary judgment be and hereby is denied.

IT IS FURTHER ORDERED That an injunction issue as follows:

> IT IS ORDERED That defendants Selective Service System, Major-General Thomas K. Turnage, United States Department of Education and Terrel H. Bell, and their agents, servants, employees and representatives, and all persons acting by, through, for or in concert with them are permanently ENJOINED from in any way enforcing in any state § 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982).
>
> IT IS FURTHER ORDERED That defendants Selective Service System, Major-General Thomas K. Turnage, United States Department of Education and Terrel H. Bell, and their agents, servants, employees and representatives, and all persons acting by, through, for or in concert with them are permanently ENJOINED from in any way enforcing in any state the regulations promulgated under § 1113 at 48 Fed. Reg. 15578 (1980) (to be codified at 34 C.F.R. 668).

IT IS FURTHER ORDERED That, pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, the Clerk of this Court forthwith enter judgment as follows:

> IT IS ORDERED, ADJUDGED AND DECREED That Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) is unconstitutional

under the Constitution of the United States, art. I, § 9 and amend. V.

IT IS FURTHER ORDERED That defendants United States Department of Education and Terrel H. Bell, through their agents, servants, employees and representatives, send notice of entry of this order to student financial aid administrators at all colleges throughout the United States and instruct such administrators to post immediately in prominent locations copies of a notice to students of entry of this order to inform students that they need not supply information as to their Selective Service registration compliance in connection with their application for or as a requirement of their receipt of Title IV student financial aid. Such notice and instruction shall be sent on or before June 30, 1983.

IT IS FURTHER ORDERED That defendants United States Department of Education and Terrel H. Bell, through their agents, servants, employees and representatives, shall eliminate the Statement of Registration Compliance and any reference to a student's registration status on all aid forms, including the Student Aid Report, to be used and distributed after June 30, 1983.

IT IS FINALLY ORDERED That defendants include with all aid forms sent out after June 30, 1983 notice of entry of this order to inform students that they need not supply information as to their Selective Service registration.

DATED: June 16, 1983.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Docket No. 3-82-1670

ALSOP—J

JOHN DOE

v.

SELECTIVE SERVICE SYSTEM, U.S. DEPARTMENT OF EDUCATION, TERREL H. BELL, Sec., MAJOR-GENERAL THOMAS K. TURNAGE, Director

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motions for summary judgment are granted and defts' motion for summary judgment is denied. Further, it is order, adjudged, and decreed that Section 1113 of Dept. of Defense Authorization Act of 1983 Pub. L. #97-252, 96 Stat. 748 (1982) is unconstitutional.

I certify this to be a true copy of the original record in my custody.

DATE: 6-16-83

ROBERT E. HESS
Clerk

BY: /s/ Gloria Griffin
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Docket Number 3-83-100

ALSOP—J

BRADLEY BOE

v.

SELECTIVE SERVICE SYSTEM, U.S. DEPARTMENT OF EDUCATION, TERREL H. BELL, Sec., MAJOR-GENERAL THOMAS K. TURNAGE, Dir.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

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IT IS ORDERED AND ADJUDGED that plaintiff's motions for summary judgment are granted and defts' motion for summary judgment is denied. Further, it is order, adjudged, and decreed that Section 1113 of Dept. of Defense Authorization Act of 1983 Pub. L. #97-252, 96 Stat. 748 (1982) is unconstitutional.

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ROBERT E. HESS
Clerk

BY: /s/ Gloria Griffin
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Action File No. 3-82-1670

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,
PLAINTIFF

and

JOHN RICHARD ROE, and PAUL POE,
INTERVENOR-PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL K. BELL, Secretary, DEFENDANTS

NOTICE OF APPEAL

The Selective Service System, Major-General Thomas K. Turnage, Director, and the Department of Education, Terrel H. Bell, Secretary, appeal under 28 U.S.C. 1252 to the United States Supreme Court from the Memorandum Order and Permanent Injunction entered in this action on June 16, 1983.

[Filed Jun. 27, 1983]

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

JAMES M. ROSENBAUM
United States Attorney

/s/ Neil H. Koslowe
NEIL H. KOSLOWE
Special Litigation Counsel
Room 3644—Civil Division
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-3418

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Action File No. 3-83-100

BRADLEY BOE, CARL COE, and FRANK FOE,
PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

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[Filed Jun. 21, 1983]

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

JAMES M. ROSENBAUM
United States Attorney

/s/ Neil H. Koslowe
NEIL H. KOSLOWE
Special Litigation Counsel
Room 3644—Civil Division
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-3418

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JAN 26 1984
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CLERK

No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JOINT APPENDIX

E. GAIL SUCHMAN
CARLA C. KIELLBERG
Minnesota Public Interest
Research Group
2412 University Avenue, S.E.
Minneapolis, Minnesota 55414
(612) 376-7554

WILLIAM J. KEPPEL
JAMES E. DORSEY, III
Dorsey and Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2745
(Counsel for Appellees)

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
(Counsel for Appellants)

JURISDICTIONAL STATEMENT FILED AUGUST 19, 1983
PROBABLE JURISDICTION NOTED DECEMBER 5, 1983

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Complaint in *Boe* v. *Selective Service System*	23
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* The opinion of the district court appears in the appendix to the jurisdictional statement and has not been reproduced.

Civil No. 3-82-1670

6-83*P2-DOE, JOHN;
P3-ROE, RICHARD; and
P4-POE, PAUL, (PLTFF.-INTERVENORS)

v.

D1 SELECTIVE SERVICE SYSTEM, Major-General Thomas K. Turnage, Director and
D2 UNITED STATES DEPARTMENT OF EDUCATION, Terrel H. Bell, Secretary, DEFENDANTS

CAUSE

Action for preliminary injunction of enforcement and challenging Constitutionality of Section 1113 of the Dept. of Defense Authorization Act of 1983.

ATTORNEYS

P2,P3,P4 (through MN Civil Liberties Union)
WILLIAM J. KEPPEL #340-2745
2200 First Bank Place E.
Mpls., MN 55402

OF Counsel:
AMY M. SILBERGER, ESQ. #378-2436
Minnesota Civil Liberties Union
628 Central Avenue
Mpls., MN 55414

*4-05-83
JAMES D. MILLER
2412 University Ave. S.E.
Mpls., MN 55414
(612) 376-7554

E. GAIL SUCHMAN #376-7554
MPIRG
2412 University Avenue S.E.
Mpls., MN 55414

J. PAUL MCGRATH
Assistant Attorney General
JAMES M. ROSENBAUM
United States Attorney
BROOK HEDGE
Branch Director
NEIL H. KOSLOWE (202) 633-3418
Special Litigation Counsel
Civil Division
Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

RELEVANT DOCKET ENTRIES

Date	Nr.	PROCEEDINGS
		CIVIL 3-82-1670 MPIRG vs. SELECTIVE SERVICE SYSTEM et al
11-23-82	1	COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF-SUMMONS ISSUED
	2	VERIFICATION OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
	3	NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION RETURNABLE BEFORE JUDGE Magnuson on Dec. 10, 1982 at 10:30 a.m. in St. Paul, Minnesota.
11-24-82	6	ORDER OF DISQUALIFICATION (Magnuson-J) that this action is resubmitted to Clerk for reassignment on Civil Rights List; this action is assigned to Judge Donald Alsop per Civil Rights List #810.
12-17-82	11	ANSWER
	12	DEFT'S MOTION FOR JUDGMENT ON THE PLEADINGS
12-20-82	13	PLTF. NOTICE OF MOTION & MOTION FOR LEAVE TO AMEND COMPLAINT, rtble. 1-10-83 at 9:30 a.m. before Judge Alsop
1-05-83	17	NOTICE OF MOTION AND MOTION TO INTERVENE AS PLAINTIFFS (COMPLAINT OF INTERVENING Pltffs attached) RETURNABLE BEFORE Judge Alsop on Jan. 10, 1983 at 9:30 a.m.
1-10-83	19	MINUTES OF PROCEEDINGS (ALSOP-J; LINDBERG-R) Ms. Suchman & Mr. Orbovich admitted to the bar of this court for purposes of this case only. Pltf. motion for pre. injunc. argued, submitted and taken under advisement. Briefs on intervention & standing due by 1-17-83.

Date	Nr.	PROCEEDINGS
1-25-83	23	ORDER (Alsop-J; 1-24-83) that pltff's mo. for leave to amend its complaint is GRANTED
	24	MEMORANDUM ORDER (Alsop-J; 1-24-83) that mo. of John Doe, Richard Roe and Paul Poe for leave to intervene is GRANTED; that complaint of intervening pltffs be served upon defts and filed with Clerk
	25	MEMORANDUM ORDER (Alsop-J; 1-24-83) that defts' mo. for judgment (treated as mo. for summ. judgment) as against MPIRG is GRANTED that Clerk enter judgment.
	26	JUDGMENT
	27	NOTICE TO COUNSEL (for docket entries 23, 24, 25, 26)
1-26-83	29	COMPLAINT FOR DECLARATORY JUDGMENT & INJUNCTIVE RELIEF OF PLTFFS John Doe, Richard Roe, and Paul Poe
	30	PLTFF-INTERVENORS' NOTICE OF MO. & MO. FOR TRO AND FOR PRELIMINARY injunction.
1-28-83	35	MINUTES OF PROCEEDINGS (Alsop-J, Lindberg-R) RE: Pltffs Motion for TRO - by conference call-denied
3-01-83	38	ANSWER OF DEFTS.
3-10-83	39	MEMORANDUM ORDER (Alsop-J; 3-09-83) that pltffs' motions for prelim. injunction are granted; that an injunction issue, w/o security
	40	PRELIMINARY INJUNCTION (Alsop-J; 3-09-83) that, until further order, defts and their agents, etc. are ENJOINED from enforcing Section 1113 of Dept. of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) but are not enjoined from promulgating and adopting regulations pursuant to Section 1113 pending final disposition of this action
	41	NOTICE TO COUNSEL

Date	Nr.	PROCEEDINGS
3-18-83	45	NOTICE OF MOTION AND MOTION BY INTERVENOR-PLTFFS FOR SUMMARY JUDGMENT & PERMANENT INJUNCTION
4-18-83	48	DEFTS. NOTICE OF MO. & MO. FOR SUMMARY JUDGT.
	49	ATTACHMENTS ORIGINALLY W:DEFTS MEMORANDUM IN RE: SUMMARY JUDGT. MOTION (Separate)
6-16-83	53	MEMORANDUM ORDER (Alsop-J) that pltff's mos. for summary judgment are granted and defts' mo. for summary judgment is denied; that an injunction is issued as foll.: that defts and their agents are permanently enjoined from enforcing in any state section 1113 of Dept. of Defense Auth. Act of 1983 and are permanently enjoined from enforcing in any state regulations promulgated under section 1113 at Fed. Reg. 15578 (1980); further that judgment is entered that Section 1113 of Dept. of Defense Auth. Act of 1983, Pub. L., #97-252, 96 Stat. 748 (1982) is unconstitutional; that defts, U. S. Dept. of Education and Terrel Bell, send notice of entry of this order to student financial aid administrators at all colleges in U. S. by 6-30-83 and shall eliminate Statement of Registration Compliance on all aid forms by 6-30-83; that defts include wi. all aid forms sent out after 6-30-83 notice of entry of this order to inform students that they need not supply info. as to their Selective Svc. registration
	54	JUDGMENT
	55	PERMANENT INJUNCTION (Alsop-J)
	57	NOTICE TO COUNSEL - for docket entries #53, 54, 55, 56

Date	Nr.	PROCEEDINGS
6-20-83	59	ORDER (Alsop-J) that defts' mo. for stay pending appeal is denied
	60	NOTICE TO COUNSEL
6-21-83	61	NOTICE OF APPEAL BY DEFTS. FROM MEMORANDUM ORDER AND PERMANENT INJUNCTION (Alsop-J; 6-16-83) Copies to counsel.

Civil No. 3-83-0100

P1-BOE, BRADLY,
P2-COE, CARL, and
P3-FOE, FRANK, PLAINTIFFS

v.

D1-SELECTIVE SERVICE SYSTEM,
MAJOR-GENERAL THOMAS K. TURNAGE,
D2-UNITED STATES DEPARTMENT OF
EDUCATION, TERREL H. BELL,
Secretary, DEFENDANTS

CAUSE

28 U.S.C. Section 2201: To declare Section 1113 of DOD Authorization Act of 1983 unconstitutional

ATTORNEYS

E. GAIL SUCHMAN #376-7554
JAMES D. MILLER
Attorneys, through The MN Public Int.
Research Group, for the pltffs (MPIRG)
2412 University Avenue S.E.
Mpls., MN 55414

NEIL H. KOSLOWE (202) 633-3418
Special Litigation Counsel
Room 3642 Civil Division
Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

Date	Nr.	PROCEEDINGS
1-26-83	1	COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - summons issued (Related case #3-82-1670 assigned to Judge Alsop)
	2	PLTFF'S NOTICE OF MO. & MO. FOR TRO AND PRELIMINARY INJUNCTION. Ret. before Judge Alsop on at
		ASSIGNED TO JUDGE ALSOP per C.R. #772
2-01-83	4	PLTFFS NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT RETURNABLE BEFORE JUDGE Alsop on Feb. 14, 1983 at St. Paul, Minnesota.
2-02-83	5	ANSWER
1-28-83	6	MINUTES OF PROCEEDINGS)Alsop-J, Lindberg-R) RE: Pltffs Motion for TRO - by conference call-denied
3-01-83	9	ANSWER OF DEFTS.
3-10-83	10	MEMORANDUM ORDER (Alsop-J; 3-09-83) that pltffs' motions for prelim. injunction are GRANTED; that an injunction issue, w/o security
	11	PRELIMINARY INJUNCTION (Alsop-J; 3-09-83) that, until further order, defts and their agents, etc. are ENJOINED from enforcing Section 1113 of Dept. of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) but are not enjoined from promulgating and adopting regulations pursuant to Section 1113 pending final disposition of this action
	12	NOTICE TO COUNSEL
4-18-83	16	DEFTS. MO. FOR SUMMARY JUDGT.
	17	ATTACHMENTS ORIGINALLY WITH DEFTS. MO. FOR SUMMARY JUDGT. (Separate)
	21	PLTFFS RENEWED MOTION FOR SUMMARY JUDGMENT

Date	Nr.	PROCEEDINGS
6-16-83	22	MEMORANDUM ORDER (Alsop-J) that pltff's mos. for summary judgment are granted and defts' mo. for summary judgment is denied; that an injunction is issued as foll.: that defts and their agents are permanently enjoined from enforcing in any state section 1113 of Dept. of Defense Auth. Act. of 1983 and are permanently enjoined from enforcing in any state regulations promulgated under section 1113 at 48 Fed. Reg. 15578 (1980); further that judgment is entered that section 1113 of Dept. of Defense Auth. Act. of 1983 Pub. L. #97-252, 96 Stat. 748 (1982) is unconstitutional; that defts, U. S. Dept. of Education and Terrel Bell, send notice of entry of this order to student financial aid administrators at all colleges in U. S. by 6-30-83 and shall eliminated Statement of Registration Compliance on all aid forms by 6-30-83; that defts. include wi. all aid forms sent out after 6-30-83 notice of entry of this order to inform students that they need not supply is as to their Selective Svc. registration
	23	JUDGMENT
	24	PERMANENT INJUNCTION (Alsop-J)
	26	NOTICE TO COUNSEL - for docket entries #22, 23, 24, 25
6-20-83	27	ORDER (Alsop-J) that defts' mo. for stay pending appeal is denied
	28	NOTICE TO COUNSEL
6-21-83	29	NOTICE OF APPEAL BY DEFTS. FROM MEMORANDUM ORDER AND PERMANENT INJUNCTION (Alsop-J; 6-16-83) Copies to counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. No. 3-82-1670

MINNESOTA PUBLIC INTEREST RESEARCH GROUP (MPIRG) and JOHN DOE, RICHARD ROE and PAUL POE, PLAINTIFFS

vs.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS.

COMPLAINT OF PLAINTIFFS JOHN DOE, RICHARD ROE AND PAUL POE

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs JOHN DOE, RICHARD ROE and PAUL POE, through their attorneys, for their Complaint against defendants, state and allege as follows:

1. This is a civil action seeking to enjoin defendants from implementing and enforcing § 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982), to be codified at 50 U.S.C. App. § 462, and any regulations promulgated thereunder, and seeking a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201 declaring that Section 1113 as cited above is un-

constitutional under the Constitution of the United States, Art. I, § 9, and the Fifth and Sixth Amendments thereof.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

VENUE

3. Plaintiffs John Doe, Richard Roe and Paul Poe are all residents of the State of Minnesota. Venue properly lies with this Court pursuant to 28 U.S.C. § 1391(e)(4).

THE PARTIES

4. Plaintiff John Doe is a male resident of Minnesota who is 21 years of age. He is currently a full time student at a college or university in Minnesota. He has received financial assistance under Title IV of the Higher Education Act of 1965, and he intends to apply for financial aid under Title IV for the 1983-84 school year. He will be unable to complete his education at his college or university unless he receives financial aid. He is subject to Section 3 of the Selective Service Act, has not presented himself for and submitted to registration under Section 3, and, therefore, cannot file with his college or university a truthful statement of compliance with Section 3 and regulations issued thereunder.

5. Plaintiff Richard Roe is a male resident of Minnesota who is 19 years of age. He is currently a full time student at a college or university in Minnesota. He intends to apply for financial aid under Title IV for the 1983-84 school year. He may be unable to complete his education unless he receives financial aid. He is subject to Section 3 of the Selective Service Act, has not presented himself for and submitted to registration under Section 3, and, therefore, cannot file with his college or university a truthful statement of compliance with Section 3 and regulations issued thereunder.

6. Plaintiff Paul Poe is a male resident of Minnesota who is 21 years of age. He formerly attended a college or university in Minnesota where he received financial assistance under Title IV of the Higher Education Act of 1965. He is presently not a student and instead is working, primarily to earn money to resume his education in the Fall of 1983. He intends to apply for financial aid under Title IV for the 1983-84 school year. He will be unable to complete his education at his college or university unless he receives financial aid. He is subject to Section 3 of the Selective Service Act, has not presented himself for and submitted to registration under Section 3, and, therefore, cannot file with his college or university a truthful statement of compliance with Section 3 and regulations issued thereunder.

7. Plaintiffs file this Complaint under ficticious names to protect themselves from possible self-incrimination and to protect their rights to privacy and also because the United States government has engaged in a policy of selective prosecution of open opponents of the draft.

8. Defendant Selective Service System is an agency of the United States. Defendant Major-General Thomas K. Turnage is the Director of the Selective Service System.

9. Defendant United States Department of Education is an agency of the United States. Defendant Terrel H. Bell is the Secretary of the United States Department of Education.

FACTUAL BACKGROUND

10. On July 2, 1980, then President Jimmy Carter issued Presidential Proclamation 4771 (45 Fed. Reg. 45247) requiring that certain male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, present themselves for registration according to a schedule based on their calendar year of birth.

11. On September 8, 1982, the United States Congress and the President of the United States approved the Department of Defense Authorization Act of 1983, Pub. L.

No. 97-252, 96 Stat. 748 (1982) (hereinafter "Defense Authorization Act"). As part of the Defense Authorization Act, Section 1113 was approved, amending by adding new Subsection 12(f) to the Military Selective Service Act (50 U.S.C. App. § 462) (hereinafter "Selective Service Act"). A copy of the amendment is attached as "Exhibit A" to this Complaint.

12. The new Section 12(f) of the Selective Service Act provides, *inter alia*, that any person failing to comply with any draft registration requirement established pursuant to Section 3 of the Selective Service Act, 50 U.S.C. App. § 453, shall be ineligible for any form of financial aid for post-secondary education provided under Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.* (hereinafter "Higher Education Act"); that any person required to register pursuant to Section 3 of the Selective Service Act must file a statement of compliance with draft registration requirements in order to receive such educational assistance; and that the Secretary of Education, in consultation with the Director of the Selective Service System, shall be charged with the implementation and enforcement of such provisions.

13. Section 12(f) of the Selective Service Act applies to all funds allocated under Title IV of the Higher Education Act beginning June 30, 1983.

14. The application process for financial aid for the 1983-84 school year commences in January 1983.

COUNT ONE

15. Section 1113 of the Defense Authorization Act improperly determines the guilt of and imposes punishment upon specific individuals or an easily ascertainable group without the protections of a judicial trial.

16. As such, Section 1113 of the Defense Authorization Act is a Bill of Attainder and violates Article I, Section 9 of the Constitution of the United States.

COUNT TWO

17. Section 1113 of the Defense Authorization Act improperly forces certain students either to incriminate themselves when applying for financial aid or penalizes them for invoking their Fifth Amendment right against self incrimination.

18. Accordingly, Section 1113 of the Defense Authorization Act deprives individuals of their right against self incrimination and violates the Fifth Amendment.

COUNT THREE

19. Section 1113 of the Defense Authorization Act will have a disproportionate impact on minorities.

20. Section 1113 of the Defense Authorization Act therefore violates equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT FOUR

21. Section 1113 of the Defense Authorization Act discriminates on the basis of wealth.

22. Section 1113 of the Defense Authorization Act therefore violates equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT FIVE

23. Only males between the ages of 18 and 26 will be affected by Section 1113 of the Defense Authorization Act.

24. Section 1113 of the Defense Authorization Act discriminates on the basis of age, and therefore violates the equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT SIX

25. Only male students will be affected by Section 1113 of the Defense Authorization Act.

26. Section 1113 of the Defense Authorization Act discriminates on the basis of sex, and therefore violates the equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT SEVEN

27. Presidential Proclamation 4771 (45 Fed. Reg. 45247) was neither expressly nor impliedly exempted from the 30 day notice and comment requirement of 50 U.S.C. § 463(b). Since it became effective 21 days after it was published, it is invalid.

28. There is no valid requirement for persons to register under the Selective Service Act.

29. Denial of federal financial aid pursuant to Section 1113 of the Defense Authorization Act violates due process in that it denies federal financial assistance for post-secondary education for the failure to certify compliance with an invalidly promulgated Presidential Proclamation.

WHEREFORE, plaintiffs John Doe, Richard Roe and Paul Poe pray that:

1. Section 1113 of the Defense Authorization Act be adjudged and declared overly broad and unconstitutional under Article I, Section 9, and the Fifth and Sixth Amendments to the Constitution of the United States;

2. Defendants be permanently enjoined from implementing and enforcing the provisions of Section 1113 of the Defense Authorization Act, including the promulgation of any regulations thereunder;

3. Plaintiffs John Doe, Richard Roe and Paul Poe be awarded their costs and disbursements of this action, including reasonable attorneys' fees; and

4. This Court grant such other relief as it deems appropriate and equitable.

Dated: January 25, 1983.

/s/ William J. Keppel
WILLIAM J. KEPPEL

/s/ James B. Lynch
JAMES B. LYNCH

/s/ James E. Dorsey III
JAMES E. DORSEY III
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: [612] 340-2745/
340-8763/343-7988

Attorneys, Through The Minnesota Civil Liberties Union, For Plaintiffs John Doe, Richard Roe and Paul Poe

Of Counsel:

Amy M. Silberberg, Esq.
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414
Telephone: [612] 378-2436

VERIFICATION

I have personally reviewed this Complaint with Plaintiffs John Doe, Richard Roe and Paul Poe and each has read it and knows the contents thereof; all have sworn that it is true and correct to the best of their knowledge.

/s/ William J. Keppel
WILLIAM J. KEPPEL

EXHIBIT A

ENFORCEMENT OF MILITARY SELECTIVE SERVICE ACT

SEC. 1113. (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:

"(f) (1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

"(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of

the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose.".

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 3-82-1670

JOHN DOE, RICHARD ROE, and PAUL POE,
INTERVENOR-PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERRELL H. BELL, Secretary, DEFENDANTS

ANSWER

The Selective Service System, Major-General Thomas K. Turnage, Director, and the United States Department of Education, Terrell H. Bell, Secretary, answer the complaint of intervenor-plaintiffs John Doe, Richard Roe, and Paul Poe, as follows:

First Defense

Intervenor-plaintiffs lack standing to sue.

Second Defense

The complaint of intervenor-plaintiffs does not raise a justiciable "case" or "controversy" under Article III of the Constitution.

Third Defense

The Court lacks jurisdiction over the subject matter of this lawsuit.

Fourth Defense

The complaint of intervenor-plaintiffs fails to state a claim upon which relief can be granted.

Fifth Defense

Defendants answer the numbered paragraphs of the complaint of intervenor-plaintiffs as follows:

1. This paragraph contains intervenor-plaintiffs' description of the lawsuit as to which no answer is required, but if an answer is deemed required, deny.

2. Deny.

3-6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in these paragraphs.

7. Deny.

8. Admit.

9. Admit.

10. Admit.

11. Deny, except to admit that on September 8, 1982, Congress enacted and the President approved the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748, and the Court is respectfully referred to that law for a full statement of its contents.

12-16. These paragraphs refer to provisions of Public Law 97-252 whose existence defendants admit, and the Court is respectfully referred to that law for a full statement of its contents.

14. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph.

15-29. Deny.

Defendants deny that relief or remedy should be granted to intervenor-plaintiffs.

Defendants specifically deny all allegations of the complaint of intervenor-plaintiffs not previously answered.

Having fully answered the complaint of intervenor-plaintiff, defendants pray that this action be dismissed

and that the Court grant such other further relief to the defendants as may be appropriate.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General
JAMES M. ROSENBAUM
United States Attorney

/s/ Brook Hedge
BROOK HEDGE
Branch Director

/s/ Neil H. Koslowe
NEIL H. KOSLOWE
Special Litigation Counsel
Civil Division
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 633-3418

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 3-82-1670

JOHN DOE, RICHARD ROE, and PAUL POE,
INTERVENOR-PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERRELL H. BELL, SECRETARY, DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on the 27th day of January, 1983, I served defendants First Set of Interrogatories to Intervenor-Plaintiffs, First Request for Production of Documents, and Answer, upon opposing counsel, by causing copies to be mailed by first-class mail to:

William J. Keppel, Esq.
James B. Lynch, Esq.
James E. Dorsey, III, Esq.
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402

/s/ Neil H. Koslowe
NEIL H. KOSLOWE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. ———

BRADLEY BOE, CARL COE, AND FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM,
MAJOR-GENERAL THOMAS K. TURNAGE, Director,

and

UNITED STATES DEPARTMENT OF EDUCATION,
TERREL H. BELL, Secretary, DEFENDANTS.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs, through their attorneys, for their Complaint against defendants, state and allege as follows:

1. This is a civil action seeking to enjoin defendants from implementing and enforcing § 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982), to be codified at 50 U.S.C. App. § 462, and any regulations promulgated thereunder, and seeking a declaratory judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201 declaring that Section 1113 as cited above is unconstitutional under the Constitution of the United States, Art. I, § 9; the Fifth and Sixth Amendments thereof; and violative of the Privacy Act of 1974, 5 U.S.C. § 552a.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

VENUE

3. Plaintiffs are all residents of the State of Minnesota. Venue properly lies with this Court pursuant to 28 U.S.C. § 1391(e)(4).

THE PARTIES

4. Plaintiff Bradly Boe is a male resident of Minnesota who is 21 years of age. He is currently a full time student at a college or university in Minnesota. He has received financial assistance under Title IV of the Higher Education Act of 1965, and he intends to apply for financial aid under Title IV for the 1983-84 school year. He will be unable to complete his education at his college or university unless he receives financial aid. He is subject to Section 3 of the Selective Service Act, has not presented himself for and submitted to all draft registration requirements under Section 3, and, therefore, cannot file with his college or university a truthful statement of compliance with Section 3 and regulations issued thereunder.

5. Plaintiff Carl Coe is a male resident of Minnesota who is 21 years of age. He is currently a full time student at a college or university in Minnesota. He has received financial assistance under Title IV of the Higher Education Act of 1965, and he intends to apply for financial aid under Title IV for the 1983-84 school year. He will be unable to complete his education at this college or university unless he receives financial aid. He is subject to Section 3 of the Selective Service Act, has not presented himself for and submitted to all draft registration requirements under Section 3, and, therefore, cannot file with his college or university a truthful statement of compliance with Section 3 and regulations issued thereunder.

6. Plaintiff Frank Foe is a male resident of Minnesota who is 21 years of age. He is currently a full time student at a college or university in Minnesota. He has received financial assistance under Title IV of the Higher Education Act of 1965, and he intends to apply for financial aid under Title IV for the 1983-84 school year. He will be unable to complete his education at his college or university unless he receives financial aid. He is subject to Section 3 of the Selective Service Act, has not presented himself for and submitted to all draft registration requirements under Section 3, and, therefore, cannot file with his college or university a truthful statement of compliance with Section 3 and regulations issued thereunder.

7. Plaintiffs file this Complaint under fictitious names to protect themselves from possible self-incrimination and to protect their rights to privacy and also because the United States government has engaged in a policy of selective prosecution of open opponents of the draft.

8. Defendant Selective Service System is an agency of the United States. Defendant Major-General Thomas K. Turnage is the Director of the Selective Service System.

9. Defendant United States Department of Education is an agency of the United States. Defendant Terrell H. Bell is the Secretary of the United States Department of Education.

FACTUAL BACKGROUND

10. On July 2, 1980, then President Jimmy Carter issued Presidential Proclamation 4771 (45 Fed. Reg. 45257) requiring that certain male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, present themselves for registration according to a schedule based on their calendar year of birth.

11. On September 8, 1982, the United States Congress and the President of the United States approved the Department of Defense Authorization Act of 1983, Pub. L.

No. 97-252, 96 Stat. 748 (1982) (hereinafter "Defense Authorization Act"). As part of the Defense Authorization Act, Section 1113 was approved, amending by adding new Subsection 12(f) to the Military Selective Service Act (50 U.S.C. App. § 462) (hereinafter "Selective Service Act"). A copy of the amendment is attached as "Exhibit A" to this Complaint.

12. The new Section 12(f) of the Selective Service Act provides, *inter alia*, that any person failing to comply with any draft registration requirement established pursuant to Section 3 of the Selective Service Act, 50 U.S.C. App. § 453, shall be ineligible for any form of financial aid for post-secondary education provided under Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.* (hereinafter "Higher Education Act"); that any person required to register pursuant to Section 3 of the Selective Service Act must file a statement of compliance with draft registration requirements in order to receive such educational assistance; and that the Secretary of Education, in consultation with the Director of the Selective Service System, shall be charged with the implementation and enforcement of such provisions.

13. Section 12(f) of the Selective Service Act applies to all funds allocated under Title IV of the Higher Education Act beginning June 30, 1983.

14. The application process for financial aid for the 1983-84 school year commences in January 1983.

COUNT ONE

15. Section 1113 of the Defense Authorization Act improperly determines the guilt of and imposes punishment upon specific individuals or an easily ascertainable group without the protections of a judicial trial.

16. As such, Section 1113 of the Defense Authorization Act is a Bill of Attainder and violates Article I, Section 9 of the Constitution of the United States.

COUNT TWO

17. Section 1113 of the Defense Authorization Act improperly forces certain students either to incriminate themselves when applying for financial aid or penalizes them for invoking their Fifth Amendment right against self-incrimination.

18. Accordingly, Section 1113 of the Defense Authorization Act deprives individuals of their right against self-incrimination and violates the Fifth Amendment.

COUNT THREE

19. Section 1113 of the Defense Authorization Act will have a disproportionate impact on minorities.

20. Section 1113 of the Defense Authorization Act therefore violates equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT FOUR

21. Section 1113 of the Defense Authorization Act discriminates on the basis of wealth.

22. Section 1113 of the Defense Authorization Act therefore violates equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT FIVE

23. Only males between the ages of 18 and 26 will be affected by Section 1113 of the Defense Authorization Act.

24. Section 1113 of the Defense Authorization Act discriminates on the basis of age, and therefore violates the equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT SIX

25. Only male students will be affected by Section 1113 of the Defense Authorization Act.

26. Section 1113 of the Defense Authorization Act discriminates on the basis of sex, and therefore violates the equal protection requirements of the Fifth Amendment of the United States Constitution.

COUNT SEVEN

27. Section 1113 of the Defense Authorization Act results in the collection and transfer of private information.

28. Section 1113 of the Defense Authorization Act results in the illegal collection and transfer of private information, and this is violative of the provisions of the Privacy Act of 1974, 5 U.S.C. § 552a.

COUNT EIGHT

29. Presidential Proclamation 4771 (45 Fed. Reg. 45257) was neither expressly nor impliedly exempted from the 30 day notice and comment requirement of 50 U.S.C. § 463(b). Since it became effective 21 days after it was published, it is invalid.

30. There is no valid requirement for persons to register under the Selective Service Act.

31. Denial of federal financial aid pursuant to Section 1113 of the Defense Authorization Act violates due process in that it denies federal financial assistance for post-secondary education for the failure to certify compliance with an invalidly promulgated Presidential Proclamation.

WHEREFORE, Plaintiffs pray that:

1. Section 1113 of the Defense Authorization Act be adjudged and declared overly broad and unconstitutional under Article I, Section 9, the Fifth and Sixth Amendments to the Constitution of the United States; and violative of the Privacy Act of 1974, 5 U.S.C. § 552a.

2. Defendants be permanently enjoined from implementing and enforcing the provisions of Section 1113 of the Defense Authorization Act, including the promulgation of any regulations thereunder;

3. Plaintiffs be awarded their costs and disbursements of this action, including reasonable attorneys' fees; and

4. This Court grant such other relief as it deems appropriate and equitable.

Dated: January 26, 1983.

/s/ E. Gail Suchman
E. GAIL SUCHMAN

/s/ Daniel W. Lass
DANIEL W. LASS
Attorneys, Through The Minnesota Public Interest Research Group, For Plaintiffs
2412 University Avenue Southeast
Minneapolis, Minnesota 55414
(612) 376-7554

VERIFICATION

I have personally reviewed this Complaint of Plaintiffs with each of them, and each has read it and knows the contents thereof; all have sworn that it is true and correct to the best of their knowledge.

/s/ E. Gail Suchman
E. GAIL SUCHMAN

ENFORCEMENT OF MILITARY SELECTIVE SERVICE ACT

SEC. 1113. (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:

"(f) (1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

"(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period

(of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose.".

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Action File No. 3-83-100

BRADLEY BOE, CARL COE, and FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM,
MAJOR-GENERAL THOMAS K. TURNAGE, Director, and
UNITED STATES DEPARTMENT OF EDUCATION,
TERREL H. BELL, Secretary, DEFENDANTS

ANSWER

The Selective Service System, Major-General Thomas K. Turnage, Director, and the United States Department of Education, Terrell H. Bell, Secretary, answer the complaint of plaintiffs Bradley Boe, Carl Coe, and Frank Foe as follows:

First Defense

Plaintiffs lack standing to sue.

Second Defense

The complaint does not raise a justiciable "case" or "controversy" under Article III of the Constitution.

Third Defense

The Court lacks jurisdiction over the subject matter of this lawsuit.

Fourth Defense

The complaint fails to state a claim upon which relief can be granted.

Fifth Defense

Defendants answer the numbered paragraphs of the complaint as follows:

1. This paragraph contains plaintiffs' description of the lawsuit as to which no answer is required, but if an answer is deemed required, deny.

2. Deny.

3-6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in these paragraphs.

7. Deny.

8. Admit.

9. Admit.

10. Admit.

11. Deny, except to admit that on September 8, 1982, Congress enacted and the President approved the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748, and the Court is respectfully referred to that law for a full statement of its contents.

12-13. These paragraphs refer to provisions of Public Law 97-252 whose existence defendants admit, and the Court is respectfully referred to that law for a full statement of its contents.

14. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph.

15-31. Deny.

Defendants deny that any relief or remedy should be granted to plaintiffs.

Defendants specifically deny all allegations of the complaint not previously answered.

Having fully answered the complaint, defendants pray that this action be dismissed and that the Court grant

such other and further relief to the defendants as may be appropriate.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

JAMES M. ROSENBAUM
United States Attorney

/s/ Brook Hedge
BROOK HEDGE
Branch Director

/s/ Neil H. Koslowe
NEIL H. KOSLOWE
Special Litigation Counsel
Civil Division
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 633-3418

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Action File No. 3-83-100

BRADLEY BOE, CARL COE, and FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM,
MAJOR-GENERAL THOMAS K. TURNAGE, Director, and
UNITED STATES DEPARTMENT OF EDUCATION,
TERREL H. BELL, Secretary, DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on this 31st day of January, 1983, I served defendants First Set of Interrogatories to Plaintiffs, First Request for Production of Documents, and Answer, upon opposing counsel, by causing copies to be mailed by first-class mail to:

Ms. E. Gail Suchman
Daniel W. Lass, Esq.
Minnesota Public Interest Research Group
2412 University Avenue, S.E.
Minneapolis, Minnesota 55414

/s/ Neil H. Koslowe
NEIL H. KOSLOWE

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.;

and

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

Appeal from the United States District Court
for the District of Minnesota

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

December 5, 1983

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FILED
OCT 4 1983
ALEXANDER L. STEVAS,
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No. 83-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,
vs.
MINNESOTA PUBLIC INTEREST RESEARCH GROUP and JOHN DOE, PAUL POE, and RICHARD ROE,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,
vs.
BRADLEY BOE, CARL COE, and FRANK FOE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

E. Gail Suchman
Carla C. Kjellberg
Minnesota Public Interest Research Group
2412 University Avenue Southeast
Minneapolis, Minnesota 55414
(612) 376-7554
Counsel for Appellees MPIRG, Bradley Boe, Carl Coe, and Frank Foe
William J. Keppel, Counsel of Record
James E. Dorsey, III
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2745
Counsel through the Minnesota Civil Liberties Union and the American Civil Liberties Union for Appellees John Doe, Richard Roe, and Paul Poe

1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTIONS PRESENTED

1. Whether Section 1113 constitutes a bill of attainder prohibited by Article I, Section 9, Clause 3 of the United States Constitution.
2. Whether Section 1113 violates the right against self-incrimination as guaranteed under the Fifth Amendment.
3. Whether Section 1113 denies equal protection under the law as guaranteed by the Fifth Amendment.
4. Whether the District Court had authority to enjoin the enforcement of Section 1113 nationwide.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-276

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, and JOHN DOE, RICHARD ROE, and PAUL POE,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

v.

BRADLEY BOE, CARL COE, and FRANK FOE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court declaring Section 1113 of the Department of Defense Authorization Act of 1983, Pub.L. No. 97-252, 96 Stat. 748 (1982)

(to be codified at 50 U.S.C. App. §462) (hereinafter "Section 1113"), unconstitutional and permanently enjoining its enforcement be affirmed. Section 1113 constitutes an unlawful bill of attainder, interferes with the right against self-incrimination guaranteed by the Fifth Amendment, and denies equal protection under the law. The decision of the District Court is, therefore, plainly correct under settled law and should be affirmed.

STATEMENT

This is a direct appeal from the final judgment and decree entered on June 16, 1983, by the United States District Court for the District of Minnesota, declaring Section 1113 of the Defense Authorization Act of 1983 unconstitutional and enjoining its enforcement. Appellees generally accept Appellants' version of the procedural history of the case presented in their Jurisdictional Statement at 4-8. However, appellees take exception to appellants' analysis at 5-6 of the legislative record of the enactment of Section 1113 as will be discussed further *infra*.

ARGUMENT

Because the decision of the district court holding Section 1113 unconstitutional is plainly correct under settled law. it should be affirmed.

1. *Section 1113 constitutes a bill of attainder prohibited by Article I, Section 9, Clause 3 of the United States Constitution.* This constitutional provision denies legislatures the ability to declare an individual or identifiable group guilty of crimes and to inflict punishment without judicial process. *United States v. Lovett*, 328 U.S. 303, 318 (1946); *United States v. Brown*, 381 U.S. 437, 442 (1965).

In *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977), the Court defined a bill of attainder as legislation which: 1) determines guilt of an individual or identifiable group; 2) inflicts punishment upon that individual or group; and 3) inflicts punishment without the protections of a judicial trial. *See United States v. Brown*, 381 U.S. at 445, 447; *United States v. Lovett*, 328 U.S. at 315-316; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867). Section 1113 meets these criteria for classification as a bill of attainder.

a. *Section 1113 legislatively determines the guilt of an identifiable group.* Section 1113 is specifically directed at a group in much the same way as Missouri's State Constitution was directed at confederate doctors, lawyers and clergymen in *Cummings, supra* (prohibiting them from practicing their professions unless they swore they had no involvement in the Confederacy), and the Labor-Management Reporting and Disclosure Act was directed at communist labor union officers in *Brown, supra* (where members of the communist party were prohibited from holding union office). In both of these cases, the legislation in question required that members of the targeted groups take affirmative action, in the form of an oath or confirmation, in order to escape the presumption of guilt for past acts placed upon them by the legislative action. Similarly, Section 1113 targets young male students who need financial aid to complete their college educations but who have not fully complied with draft registration requirements. The provision requires each student to submit a statement

of compliance in order to escape the presumption of guilt for his past act of nonregistration.[1]

Appellants' argument that Section 1113 is not a bill of attainder because it does not target persons who have engaged in "past" acts is without merit. Unlike *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), where Section 9(h) of the National Labor Relations Act was held not to be a bill of attainder because it allowed a person to take action at any time to avoid the sanctions of the statute, Section 1113 on its face singles out an ascertainable group based on past conduct. (Appellants' App. A, at 11a-12a.) Appellants contend that Section 1113 allows a college student to register for the draft *anytime* in order to become eligible for federal financial aid, relying upon regulations promulgated by the Department of Education in consultation with the Selective Service System which state specifically that registration can take place *anytime* for eligibility. What appellants neglect to point out is that not only are the regulations irrelevant in this challenge to Section 1113, but also, as the district court held, they are blatantly inconsistent with Section 1113, and, as such, are void. (Appellants' App. B at 33a-34a).

Section 1113 unambiguously provides:

> (f) (1) Any person who is required *under Section 3* [of the Military Selective Service Act, 50 U.S.C. App. §453] to present himself for and submit to registration *under such section* and fails to do so in ac-

[1]Appellants attempt to analogize the operation of Section 1113 to the Veterans Benefits Act, 38 U.S.C. §1501 *et seq.* which defines classes of veterans eligible to receive educational benefits. But that Act does not involve an assumption of guilt of a crime by Congress and an associated punishment determined by Congress. These are the criteria that transform a simple conditional benefit into a bill of attainder. Section 1113 is such a bill of attainder.

> cordance with any proclamation issued *under such section*, or in accordance with any rule or regulation issued *under such section*, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

[*Emphasis added.*] The operative Presidential Proclamation issued under Section 3 in this present registration system requires, *inter alia*, that all male citizens born after January 1, 1963, *must* register within *thirty* days before or after they reach their eighteenth birthday. Proc. No. 4771, 45 Fed. Reg. 45247 (July 2, 1980). Failure to register within that period of time is a crime and punishable, upon conviction, with a jail sentence of up to five years and a fine of up to $10,000.

Appellants ask this Court to interpret Section 1113 to require compliance, not with Section 3 of the Selective Service Act, but with regulations subsequently promulgated under Section 1113 by the Department of Education. However, Section 1113 expressly requires compliance with Section 3 of the Selective Service Act in order to receive financial aid. The regulations promulgated by the Department of Education can only be viewed as the agency's "post mortem" attempt to cure an otherwise unconstitutional statute.[9]

b. *Section 1113 legislatively inflicts punishment upon the identifiable group.*

In determining whether the sanction contained in Section 1113 constitutes punishment within the meaning of

[9]Appellants, on the one hand, recognize that late registrants are subject to prosecution, and, on the other hand, tell students to register late and then require the admission of such guilt on a "statement" which must be submitted in order to receive college financial aid. This hardly conforms to the dictates of the Constitution.

the bill of attainder proscription, this Court in *Nixon v. Administrator of General Services*, 433 U.S. at 473-8, articulated three factors which must be evaluated: (1) whether the sanction is similar to traditional forms of punishment; (2) whether the law, viewed in light of its restraints, can be said to further non-punitive purposes; and (3) whether there was congressional intent to punish.

"[A] legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal," has been viewed in this Court's jurisprudence as a traditional form of punishment. *Nixon*, 433 U.S. at 474. Indeed, as the Court recognized in *Cummings*, "[t]he deprivation of any right, civil or political, previously enjoyed may be punishment . . . ." 71 U.S. (4 Wall.) at 320.

Denial of federal financial benefits and the consequential deprivation of the opportunity to pursue one's education and chosen profession is a sanction which falls within the definitions of punishment enunciated in *Nixon* and *Cummings*. The courts, including this Court and the district court, recognize the extraordinary importance of education to individuals in our society and its critical role in enabling, or in disabling, citizens from pursuing their chosen careers. *Plyler v. Doe*, 457 U.S. 202 (1982), *reh. den.*, —— U.S. —, 103 S.Ct. 14 (1983); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1979), Appellants' App. A at 3a-4a.

Punishment need not be only punitive but may be imposed for a variety of different purposes. As noted in *Brown*, 381 U.S. at 458:

> It would be archaic to limit the definition of "punishment" to "retribution". Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment.

See also, *Flemming v. Nestor*, 363 U.S. 603 (1959); *Communist Party of the U.S. v. Subversive Activities Control Board*, 367 U.S. 1 (1960).

Appellants claim that Section 1113 could be reasonably interpreted to further non-punitive legislative purposes. They argue that Section 1113 serves to encourage draft registration compliance, to promote the "fair" allocation of scarce federal aid dollars, and to assist the Selective Service in its enforcement of the draft laws. However, the legislation in question serves no legitimate purpose other than that usually achieved by punishment, retribution and deterrence. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-9 (1963).[9] *Brown*, 381 U.S. at 458. Following *Kennedy*, the district court concluded that Section 1113 "imposes both the restraint and [a] disability, assumes non-registrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes." (Appellants' App. A at 15A-16A.) It found that appellants' claims would result in laws that constitute

[9]In this case, the Court declared unconstitutional that a portion of the Immigration and Nationality Act of 1952, 8 U.S.C. §1481(a), which stripped pacifists who fled that country to avoid military service of their U.S. citizenship, whether or not they had been convicted of draft evasion. 372 U.S. at 184.

impermissible punishment avoiding the bill of attainder proscription merely by being relabeled as "encouragement".[4]

The legislative history of Section 1113 convincingly demonstrates that Congress intended to punish a particular group of persons who were already subject to criminal prosecution and punishment under Section 12 of the Selective Service Act, 50 U.S.C. App. §462. Its sponsor declared:

> . . . I intend not only to offer this amendment to this legislation, but as other legislation comes down the pike, such as the jobs training bill, such as home loans in various categories, I intend to offer the same amendment until every young man is deprived of any kind of Federal assistance unless he has obeyed the law. . .

Comments of Representative Solomon, 128 Cong. Rec. H4757, (July 28, 1982). Another supporter agreed: "As the gentleman said, the 500,000 [who have not registered], it is a felony, they have violated the law, and they

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[4]Appellants cite *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as supporting the Government's claim that there exists a broad right to condition the receipt of federal monies in any way. Neither *Fullilove* nor any cases cited address or support the imposition of conditions in violation of the Bill of Attainder Clause. In *Fullilove*, the Supreme Court upheld an administrative requirement, which could be waived, that at least 10 percent of federal funds granted for local public works projects be used to procure services from "minority business enterprises." This "condition" was upheld because it furthered Congress' policy of remedying past racial discrimination. Interestingly, the Court stated at 490:

> The Congress must proceed only with programs narrowly tailored to achieve its objectives . . . and, when such a program comes under judicial review, *courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations. (Emphasis added.)*

Here, the Selective Service System's attempt to enforce a criminal statute, without the usual constitutional guarantees associated with arrest and trial, through the vehicle of disbursement of federal financial aid to college students, is not within the bounds of constitutional limitations.

are not entitled to those educational benefits." 128 Cong. Rec. H4757. Thus, this Congressional call for sanctions without trial is clearly in addition to the penalties (5 years imprisonment or $10,000 fine or both) imposed by the Selective Service Act upon conviction for failure to register for the draft. The imposition of punishment was questioned by some Representatives:

> I also question the premise that [additional] punishment should be used in order to induce young men to obey the law. This amendment has the obvious primary objective of increasing the number of men registered for the draft. However, it also has a secondary, and more subtle, objective, which is to punish those individuals who do not register.

Comments of Representative Edgar, 128 Cong. Rec. H4760 (July 28, 1982).

The motivation for passage of Section 1113 expressed in floor debates is associated with punishment—either retribution for failing to register or deterrence of noncompliance as a method of enforcing the draft. No mention whatsoever was made about the relationship of Section 1113 to the goals of the Higher Education Act, 20 U.S.C. §1070 *et seq.*, or to any other educational objective.[5] *See* Comments of Representative Schroeder, 128 Cong. Rec. H4762, (July 28, 1982).

As the district court found (Appellants' App. A at 17a-19a), the motivations expressed by the author of Section 1113 and its supporters provide conclusive evidence of the Congressional intent to punish a specific group of young men for their failure to register for the draft.

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[5]The intent of Congress is also revealed in that Section 1113 was designed not as part of any education act but as an amendment to the Section of the Selective Service Act which imposes criminal sanctions. 50 U.S.C. App. §462.

c. *Section 1113 legislatively determines guilt and inflicts punishment without benefit of the protections of a judicial trial.* Section 1113, which automatically imposes a sanction without judicial intervention, falls precisely within the bill of attainder prohibition.

In *Lovett, supra,* a provision denying certain federal employees their jobs because they were believed to be "subversive" was found to inflict punishment without the safeguard of judicial trial and to therefore constitute an unlawful bill of attainder. This Court noted that the Bill of Attainder Clause was included in the Constitution for the very purpose "to safeguard the people of this country from punishment without trial by duly constituted courts." 328 U.S. at 317-319.

Where the legislature exceeds the bounds of its authority, the judiciary has the responsibility to contain it. Section 1113 exceeds the legislative limits outlined in the Bill of Attainder Clause of the Constitution.

2. *Section 1113 violates the Fifth Amendment's mandate that "no person . . . shall be compelled in any criminal case to be a witness against himself."* This privilege against compelled self-incrimination serves to protect criminal suspects from "the cruel trilemma of self-accusation, perjury, or contempt." *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55 (1964).

The privilege applies "in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory", 378 U.S. at 94 (White, J., concurring), and includes written submissions to governmental agencies. *Marchetti v. United States,* 390 U.S. 39 (1968) (the privilege against self-incrimination may be asserted by a person who was directed by statute to register his wagering activities for tax purposes).

Appellants argue that there is no violation of the Fifth Amendment privilege because non-registered students are not compelled to provide incriminating information since they need not apply for financial aid. This reasoning has been consistently rejected. *Marchetti, supra; Garrity v. New Jersey*, 385 U.S. 493, (1967). As the Court in *Garrity* noted, "where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." 385 U.S. at 498.

Section 1113 forces students who apply for financial assistance under Title IV of the Higher Education Act to fill out a statement of draft registration compliance. In doing so Section 1113 forces students who need tuition assistance to face a trilemma of self-incrimination, perjury, or foregoing educational opportunities. The loss of educational opportunity is as grave a sanction as is the criminal contempt charge contemplated in the *Murphy* trilemma. As the district court acknowledged, "denial of the opportunity to pursue one's education and chosen profession is a severe penalty in this society." (Appellants' App. A at 28a).[8] By threatening such a severe penalty, the mandatory language of Section 1113 compels the production of information within the meaning of the Fifth Amendment. Hence, an applicant for student financial aid must be able to assert the privilege against self-incrimination.

Section 1113 violates the Fifth Amendment's protection against self-incrimination in two ways: first, the statute penalizes those who assert the privilege by denying them access to Title IV funds, thereby burdening the privi-

[8]This Court has repeatedly recognized the importance of higher education, and the ability to pursue one's chosen vocation. *See Plyler, supra; Withrow v. Larkin*, 421 U.S. 35, 44. n.8 (1975); *Vlandis v. Kline*, 412 U.S. 441 (1973).

lege; and, second, the statute's scheme of operation serves to incriminate even those who choose to assert the privilege.

a. *Section 1113 burdens the privilege against self-incrimination.* Under Section 1113 the refusal of an applicant to submit a statement of compliance on the basis of his Fifth Amendment privilege against self-incrimination would automatically cut him off from consideration for federal tuition assistance.

In the past, when people have been punished for asserting their Fifth Amendment privilege against self-incrimination, this Court has been quick to strike down such practices and to uphold the privilege. *See, e.g., Lefkowitz v. Cunningham,* 431 U.S. 801 (1977) (divesting political officeholder of his office and imposing a five-year ban on holding any public or party office for refusal to waive his constitutional immunity in a grand jury investigation of his conduct held unconstitutional); *Lefkowitz v. Turley,* 414 U.S. 70 (1973) (denying public contractors the right to contract with the government for five years upon their refusal to sign waivers of immunity held unconstitutional); *Garrity, supra,* (requiring police officers in an inquiry by the state attorney general concerning the fixing of traffic tickets to respond to questions or face removal from office held unconstitutional); *Spevack v. Klein,* 385 U.S. 511 (1967) (disbarring a lawyer for failure to honor a *subpoena duces tecum* and to testify at the judicial inquiry held unconstitutional). Section 1113 similarly constrains an individual's right to assert a Fifth Amendment privilege and is therefore unconstitutional.

b. *Section 1113 also violates the Fifth Amendment because it incriminates even those who assert the privilege against self-incrimination.* Section 1113 directs that there be communication between the Director of the Selective Service System and the Secretary of Education, including a transmittal of names of applicants from the Secretary to the Director for purposes of verification. The implications of an applicant's assertion of his Fifth Amendment rights are clear. The Selective Service System will be put on notice that the applicant is in violation of the law. "The information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant." (Appellants' App. A at 23a). *See Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 77 (1965).

Section 1113 requires that students, wholly outside the prosecutorial process, come forward and inform the government as to whether they have registered for the draft. The students are faced with the impermissible trilemma of self-accusation, submitting a false statement of compliance (which gives rise to criminal liability), or forgoing educational opportunities and pursuing their chosen careers.[7] To maintain the Fifth Amendment guarantee that the government may not compel self-incrimination, Section 1113, which provides government assistance only to those who forfeit their rights against self-incrimination, should be declared unconstitutional.

3. *Section 1113 denies students in need of financial aid equal protection under the law.* Although the district court did not reach the issue, Section 1113 violates the Equal Protection Clause of the Constitution because it discriminates on the basis of wealth, sex, and age.

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[7]Indeed, the forgoing of educational opportunities by withdrawing from the federal financial aid program may be self-incriminating for male students who have previously received aid. If these students suddenly withdraw from the program, they leave an incriminating trail.

a. *Section 1113 is discriminatory on the basis of wealth.* The Section 1113 requirement of certifying compliance with draft registration obligations as a prerequisite to obtaining federal assistance for post-secondary education establishes an unnecessary burden and penalty on those who cannot afford to go to college without such assistance. The very purpose of the Higher Education Act, 20 U.S.C. §1070 *et seq.*, and the provisions for federal financial aid is to encourage attendance at colleges and universities for the ultimate benefit of society. This Court also has recognized the critical role of higher education and its importance to growth in society. *Plyler v. Doe*, 457 U.S. at 221.

During the Senate debates which resulted in enactment of Section 1113, Senator Durenberger of Minnesota recognized that Congress, "would be punishing [the] middle class . . . more than we punish those who are wealthy enough to pay their own way through college, and more than those who do not attend college at all." 128 Cong. Rec. S4945 (May 12, 1982). *See also* Comments of Congressman Dellums, 128 Cong. Rec. H4765 (July 28, 1982). Even the bill's sponsor recognized that ". . . maybe we are discriminating against the poor." 128 Cong. Rec. H4767 (July 28, 1982).

While this Court has been reluctant to elevate the standard of review for discrimination based upon wealth to that applied to discrimination based on race, religion, or alienage (although wealth discrimination may have a strong adverse impact on such minority groups), discrimination based upon wealth may be unconstitutional if it is unrelated to a rational legislative purpose and is "invidious". *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). There is no rational

relationship between enforcement of the draft registration requirements of the Selective Service Act and this interference with the purposes the the Higher Education Act which results in termination of essential educational and career opportunities.

The enforcement mechanism for non-registration is clear, 50 U.S.C. App. §462 (1981). Non-registration is a crime subject to indictment, trial, conviction, and punishment, all involving well-established constitutional protections. Section 1113, adding new Section 12(f) to the enforcement section of the Selective Service Act, creates an unconstitutional burden upon a class of students based upon their lack of wealth which is wholly unnecessary and serves no legitimate legislative purpose.

Justice White, concurring in *Vlandis v. Kline*, 412 U.S. 441 (1973), which faced the issue of resident and non-resident college fees, suggests the appropriate standard of review where discrimination arising out of higher education is involved:

> . . . [I]t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.
>
> *Here, it is enough for me that the interest involved is that of obtaining a higher education,* . . . It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed

> by the State is invidious and violates the Equal Protection Clause. (*Emphasis added.*)

Here the interest involved is obtaining a higher education which similarly outweighs the appellants' interest, if any, in maintaining Section 1113. Thus, the pattern of discrimination based on wealth is invidious and violates the Equal Protection Clause.

b. *Section 1113 discriminates on the basis of sex.* Utilizing the standard of review described in the previous section, this Court has struck down many laws for discriminating on the basis of sex. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court found that gender-based classifications cannot be sustained merely because they promote some governmental interest. A statute which classifies individuals on the basis of gender must have an "exceeding persuasive justification" for that classification. *Mississippi University for Women v. Hogan*, —— U.S. ——, 73 L.Ed. 2d 1090 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also, Reed v. Reed*, 404 U.S. 71, 76 (1971). Underlying these decisions is the principle that a legislature may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981).

Under this analysis, the sex classification in Section 1113 is invidious. While this Court has upheld the sex-based characteristic of the all male draft, *Rostker v. Goldberg*, 453 U.S. 57 (1980), the dissimiliarities between the sexes inherent in military combat roles are irrelevant to education and the policies underlying federal educational financial assistance. No differences exist between

men and women with respect to the importance of higher education to each and to their need for financial assistance.

Appellants have failed to provide an "exceedingly persuasive justification" for discriminating in the distribution of financial aid on the basis of sex.

c. *Section 1113 is discriminatory on the basis of age.* It is not often that a statute discriminates against young adults instead of the "old", but this is one of those cases. Section 3 of the Selective Service Act requires registration only by males between the ages of 18 and 26. While this range of ages may be reasonable with regard to preferability for the draft, it is not reasonable when determining eligibility for educational financial aid. Young men in this age group may be denied financial aid to attend college and to pursue their chosen careers while those in other age groups are not so burdened. Using the standards applicable to discrimination based on wealth and sex, the result is discrimination against young men on the basis of age.

4. *Injunctive relief granted by the district court has nationwide effect.* When a federal statute of nationwide scope is found unconstitutional in an action against those charged with its national enforcement, a court need not, and indeed should not, sanction continuing unconstitutional conduct by limiting its order to a particular judicial district. The very provision in 28 U.S.C. §1252 that any district court judgment holding an Act of Congress unconstitutional may be appealed directly to this Court suggests that such judgments have nationwide effect. In addition, all relevant cases hold that district courts may grant nationwide injunctions.

Califano v. Yamasaki, 442 U.S. 682, 702 (1979), held that the territorial scope of an invalid act or regulation, as opposed to the territorial scope of the plaintiffs, determines the scope of the injunction. Explicitly following *Califano*, the court in *State of New York v. Schweiker*, 83 Civ. 0726 (S.D.N.Y. March 7, 1983), having struck down, as violating the Public Health Services Act, a regulation requiring federally-funded family planning services to notify the parents of any minor who has been provided prescription contraceptives, enjoined the Secretary of Health and Human Services from implementing the regulation anywhere in the United States.

Furthermore, when a district court has personal jurisdiction over a defendant, the district court may issue an injunction which binds the defendant throughout the United States. *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932). *See also, Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963) *cert. denied*, 376 U.S. 910 (1969) (despite the absence of a certified class action, an injunction based on a finding that Mississippi's "Segregation Statutes" were unconstitutional was given statewide effect); *National Welfare Rights Organization v. Weinberger*, 377 F.Supp. 86 (D.D.C. 1974) (despite the denial of class certification, a nationwide injunction was granted against the Department of Health, Education and Welfare).

As the district court stated, "any injunction limited to the geographic area of Minnesota would allow defendants to enforce outside the district of Minnesota a statute that this court has found to be unconstitutional on two grounds. Such an anomalous result should be avoided." (Appellants' App. B, at 35a).

CONCLUSION

For the reasons stated herein, the decision of the United States District Court for the District of Minnesota should be affirmed.

Respectfully submitted,

E. Gail Suchman
Carla C. Kjellberg
Minnesota Public Interest Research Group
2412 University Avenue Southeast
Minneapolis, Minnesota 55414
(612) 376-7554
Counsel for Appellees MPIRG, Bradley Boe, Carl Coe, and Frank Foe
William J. Keppel, Counsel of Record
James E. Dorsey III
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2745
Counsel through the Minnesota Civil Liberties Union and the American Civil Liberties Union for Appellees John Doe, Richard Roe, and Paul Poe

Of Counsel:

Amy M. Silberberg
Legal Counsel
Minnesota Civil
Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414
Telephone: (612) 378-2436
Charles S. Sims
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
Telephone: (612) 944-9800

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No. 83-276

In The

Supreme Court of the United States

October Term, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants

vs.

BRADLEY BOE, ET AL.

On Appeal from the United States District Court for the District of Minnesota

[redacted]

BRIEF OF SWARTHMORE COLLEGE AS AMICUS CURIAE IN SUPPORT OF MOTION TO AFFIRM OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET AL.

ALAN R. HUNT
THOMAS P. PRESTON
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6324 and 854-6237
Counsel for Swarthmore College

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which states that those who fail to register as required by the Military Selective Service Act shall be ineligible for federal educational assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which also states that those who wish to receive Title IV assistance and who are required to register must file a statement of compliance with their colleges—compels such persons to incriminate themselves in violation of the Fifth Amendment.

3. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the rights to freedom of association and free speech protected by the First Amendment.

4. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the right to equal protection under the due process clause of the Fifth Amendment.

5. Whether Section 1113 of the Department of Defense Authorization Act of 1983, in addition to impinging on the constitutional rights identified above, so burdens educational freedom and the quasi-fundamental right to an education that the statute may not be permitted to stand.

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No. 83-276

In The
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SELECTIVE SERVICE SYSTEM, ET AL.,
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SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants
vs.
BRADLEY BOE, ET AL.

On Appeal from the United States District Court for the District of Minnesota

MOTION BY SWARTHMORE COLLEGE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET AL.

Swarthmore College ("Swarthmore") respectfully moves this Court for leave to file the attached BRIEF OF SWARTHMORE COLLEGE AS AMICUS CURIAE IN SUPPORT OF MOTION TO AFFIRM OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET

AL. The grounds for the Motion of Swarthmore, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, are stated below.

I. Petitioner and Respondents Have Consented to the Filing of this Brief.

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Swarthmore requested petitioner, Selective Service System, *et al.* ("the Government") and respondents, Minnesota Public Interest Research Group, *et al.* and Bradley Boe, *et al.*, to consent to the filing of an *amicus curiae* brief in support of the respondents' Motion to Affirm. Both petitioner and respondents have consented to the filing of this brief. *See* App. A, *infra*, 1-3.

II. Interest of Swarthmore College.

Swarthmore College is a small, liberal arts college founded in 1864 by members of the Religious Society of Friends (Quakers). While Swarthmore is financially well-endowed in comparison with most higher educational insitutions in this country, many of its students are heavily dependent upon financial assistance under Title IV of the Higher Education Assistance Act of 1965, 20 U. S. C. § 1070 *et seq.*

For example, in the academic year 1982-83, 58% of Swarthmore's students received Title IV federal assistance. Of that number, 56% were men.

Furthermore, over 83% of the minority students enrolled at Swarthmore in 1982-83 received federal assistance under the Title IV programs. Since all Title IV federal assistance is awarded on a need basis, it is unchallengeable that a reduction of such federal assistance will have a significant, adverse impact on the ability of those with the fewest financial resources to attend Swarthmore College. This will be particularly so for minority students with limited financial resources.

Furthermore, the administrative burden imposed on Swarthmore by the regulations issued by the Department of Education (issued April 11, 1983, 48 Fed. Reg. 15578) to implement Section 1113, when fully phased in two years from now, will be enormous. Swarthmore has previously estimated that merely to implement the new requirements of the statute would require the equivalent of one person working full time for nearly one-half year. Furthermore, when the full effect of the regulations is felt two years hence nearly 50% of the total educational aid made available to Swarthmore students may be delayed while the college and its students are required to go through a number of additional administrative steps in order to qualify for such aid. The impact on Swarthmore and its students will be significant.

III. Questions That Have Not Been Adequately Presented And Their Relevance To The Disposition Of This Case.

Respondents Minnesota Public Interest Research Group, *et al.*, and Bradley Boe, *et al.*, have thoroughly discussed the first two questions presented for review by this Court, *i. e.*, the bill of attainder and self-incrimination

arguments. Swarthmore joins in those arguments and supports respondents' contention that the district court properly decided those issues and that that decision should be summarily affirmed.

However, neither the Government nor respondents have addressed certain other issues central to this case. Those issues, presented to the district court but not decided by it, also support summary affirmance.

First, Section 1113 affects the availability of federal financial aid only to male students of draft registration age. While female students are required to file statements of compliance, the fact that they are not required to register under the Selective Service Act removes the threat that female students will lose their access to federal financial assistance for noncompliance with the registration requirement.

This gender-based distinction in the availability of federal financial aid to students attending post-secondary educational institutions violates the rights of male students to equal protection under the due process clause of the Fifth Amendment. There is no rational basis for imposing a higher burden on males seeking federal educational assistance than on females, yet that is the inevitable result of the implementation of Section 1113.

To make matters worse, the implementation of Section 1113 will have a far greater impact on male students who are members of minority groups than on non-minority students. The experience of Swarthmore shows that the proportion of minority students receiving federal financial assistance is significantly higher than is the proportion of non-minority students. Thus, Section 1113 will impose a double burden on male minority students: 1) in

order to receive federal financial assistance they will be subject, because they are males, to a requirement not imposed on female students; 2) they are more likely to be subject to this requirement because as members of a minority group, they are more likely to require federal financial assistance in order to attend a post-secondary educational institution. In the latter case, Section 1113 violates the rights of such minorities to equal protection under the Fifth Amendment to the Constitution.

Second, the rights to free association and free speech under the First Amendment have not been addressed by either appellants or respondents. Swarthmore is an institution with a strong pacifist history and tradition. The implementation of Section 1113 will adversely affect Swarthmore's ability to attract and keep students with such views, since their ability to obtain federal educational assistance necessary to attend such a college may be adversely affected by this statute. That burden is an unconstitutional impingement on the right to free association and free speech under the First Amendment to the Constitution.

Third, neither appellants nor respondents have addressed the difficult issue of the burden Section 1113 places on the quasi-fundamental right to an education recognized by this Court, in a different context, in *Plyler v. Doe*, 457 U. S. 202, 102 S. Ct. 2382 (1982). The district court, however, recognized that the threat to the ability of students to obtain a post-secondary education constituted irreparable damage sufficient to justify issuing a preliminary, and ultimately a permanent, injunction against the enforcement of Section 1113. *See* Appendix A to Appellants' Jurisdictional Statement, 3a-5a.

Furthermore, the heavy administrative and financial burden imposed on colleges and universities by this statute is an impermissible threat to educational freedom. The threat to free educational institutions, and the burden on the right of students to obtain an education, are factors which weigh heavily against the constitutionality of Section 1113. In considering each of the specific constitutional challenges (bill of attainder, right against self-incrimination, right to equal protection under the due process clause, and the rights to freedom of association and speech) these burdens must be carefully balanced against the arguments the Government has offered in support of the constitutionality of the federal statute.

Swarthmore has an intense interest in the issues involved in this case, both because of its traditions and because of the impact this statute will have on the College and its students. We submit that these issues are too important to permit of anything less than an exposition of the views of at least one of the nation's colleges. Therefore, we respectfully ask the Court's leave to file the attached Brief addressing these issues.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER
ALAN R. HUNT
THOMAS P. PRESTON

1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6324 and 854-6237

Counsel for Swarthmore College

No. 83-276

In The

Supreme Court of the United States

October Term, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants

vs.

BRADLEY BOE, ET AL.

On Appeal from the United States District Court for the District of Minnesota

BRIEF OF SWARTHMORE COLLEGE AS AMICUS CURIAE IN SUPPORT OF MOTION TO AFFIRM OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET AL.

STATEMENT OF INTEREST AND QUESTIONS PRESENTED

Swarthmore College ("Swarthmore") incorporates by reference the Statement Of Interest and Questions That Have Not Been Adequately Presented and Their Relevance To The Disposition Of This Case as set forth in paragraphs II and III of Swarthmore's Motion For Leave To File Brief As Amicus Curiae which immediately precedes and is bound together with this Brief.

ARGUMENT

I. Swarthmore Urges Affirmance Of The District Court Or Noting Of Probable Jurisdiction With The Opportunity For Full Briefing And Argument.

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.*, imposes a new and unparalleled burden on students seeking federal educational assistance. Such assistance has long been available under Title IV of the Higher Education Act of 1965, 20 U. S. C. (and Supp. V) 1070 *et seq.* Under the terms of Section 1113, students required to register for military service under Section 3 of the Military Selective Service Act, 50 U. S. C. App. (Supp. 5) 453, are ineligible for federal educational assistance under Title IV unless they have complied with the draft registration requirement. All students, whether subject to the provisions of the Military Selective Service Act or not, are required to file statements of registration compliance prior to receiving Title IV funds.

There can be no serious question that the sole purpose of this requirement is to aid in the enforcement of the draft registration law. Such intertwining of draft registration and education is unjustified and constitutionally offensive.

Swarthmore brings to this case a strong pacifist tradition, and a history of being a center for independent social and political thought. It is critical to such a college that it be able to maintain the heterogeneity of its student body and faculty. Section 1113 endangers that diversity by challenging the ability of certain groups of students—those with limited financial resources—to attend colleges such as Swarthmore.

Further, by making colleges and universities central to the enforcement of its provisions, the statute has imposed a significant financial and administrative burden on all higher educational institutions. In a time of decreasing resources, such burdens are unacceptable. They become particularly offensive when they are imposed with no educational objective or intent.

Section 1113 challenges the foundations of our free educational institutions. The statute isolates particular groups of students for special, adverse treatment in an area—education—totally unrelated to the objective the statute is designed to advance—military preparedness. At the same time, Section 1113 forces the colleges and universities to adopt a relationship with their students which is at best unrelated to their educational pursuits, and at worst makes that relationship adversarial.

It is Swarthmore's hope that it may, in its role as *amicus curiae*, identify for the Court constitutional prob-

lems raised by Section 1113 not addressed by the parties. Having brought those problems to the Court's attention, we urge summary affirmance of the district court's decision. In the alternative, we respectfully ask that the Court note probable jurisdiction and provide the opportunity for full briefing and argument on these critical issues.

II. The District Court Correctly Identified Two Of The Constitutional Flaws In This Statute. These And Other Constitutional Infirmities Justify Summary Affirmance.

The analysis by the district court of the bill of attainder and self-incrimination arguments, discussed thoroughly by the respondents, requires no further comment from Swarthmore. We merely note that the Government has offered nothing new on these issues in its Jurisdictional Statement. The district court opinion carefully analyzed and applied the teachings of this Court, and therefore no substantial questions are raised by this case requiring the consideration of the Court.

Bolstering the decision of the court below are a number of other constitutional problems raised by Section 1113. The district court did not decide these issues, having already determined that the statute must fail for violation of the bill of attainder and self-incrimination provisions of the Constitution. However, these additional problems provide further justification for summary affirmance of the lower court.

Swarthmore makes no pretense of trying to develop fully these additional arguments here. We believe that merely identifying them for the Court's consideration will best fulfill the role of *amicus curiae* at this stage. Should the Court determine that summary affirmance is not ap-

propriate, we respectfully urge that it note probable jurisdiction and set the case for full briefing and argument. At that stage, we intend to ask for leave to participate as *amicus* to develop fully the arguments identified herein.

A. Section 1113 Is A Violation Of Equal Protection Under The Fifth Amendment Because It Discriminates Against Males And Particularly Against Male Members Of Minority Groups.

The first additional constitutional problem raised by Section 1113 is the statute's violation of equal protection provided by the due process clause of the Fifth Amendment to the Constitution. The statute requires that all students seeking federal assistance file statements of registration compliance asserting that the provisions of the Military Selective Service Act have been satisfied. While both male and female students are required to file these statements, only males are required to register for the draft, a requirement this Court has already found passes constitutional muster. *Rostker v. Goldberg*, 453 U. S. 57 (1981).

However, as a result Section 1113 penalizes only male students seeking federal educational assistance. While it is constitutionally permissible to require males only to register for the draft, it is not constitutionally permissible to penalize only males seeking federal educational assistance. The nexus between draft registration and federal funding for students attending post-secondary educational institutions is too tenuous to withstand constitutional scrutiny where the burden falls exclusively on one group of students.

In fact, this burden not only falls only on male students, but also falls most harshly on minority students who

are male. As Swarthmore argued before the district court, its minority students, both male and female, are much more dependent upon federal educational funding than are its non-minority students. Section 1113, by burdening the availability of federal funds, will have a dramatically greater impact on male students who are members of minority groups than on other groups seeking Title IV funding.

The principle of equal protection under the due process clause of the Fifth Amendment does not permit benefits to be denied to certain groups and not to others, at least without a strong justification. The need to enforce the draft registration law does not provide the kind of justification required under the Fifth Amendment.

B. The Rights Of Free Speech And Freedom Of Association Are Improperly Burdened By Section 1113.

Section 1113 also impinges on the rights to free speech and freedom of association of students holding pacifist views who may find the draft registration requirements morally abhorrent. Students holding such views have traditionally enrolled at Swarthmore in significant numbers, and it is important to Swarthmore that students holding such views continue to be able to enroll there.

Over 50% of the students attending Swarthmore have received federal educational assistance in the past. In the future, in order to receive such assistance, students may have to compromise their pacifist beliefs. The alternative, at least for those with limited financial means, will be not to attend private institutions such as Swarthmore. That is a result which cannot be justified by the need to

enforce the draft registration law, particularly where there are already ample enforcement mechanisms which do not impinge on the speech or association rights of the students.

C. Other Serious Deficiencies Of Section 1113 Add Weight To The Constitutional Arguments.

Finally, Section 1113 raises other serious problems which weigh the scales against sustaining the statute. These problems may not, by themselves, rise to the level of constitutional infringements. However, they provide further support for the contention that this statute is ill-conceived and improper.

In *Plyler v. Doe,* 457 U. S. 202, 102 S. Ct. 2382 (1982), this Court identified public education as a quasi-fundamental right, not a mere governmental benefit. *Id.* at 222, 102 S. Ct. at 2397. While *Plyler* dealt with the right to education at a lower level, it is instructive in the present situation. While Title IV of the Higher Education Act makes financial assistance available to those attending institutions of higher learning, the Government may not burden that benefit for some potential recipients for reasons utterly unrelated to the educational purposes served by Title IV. This becomes even more compelling where the burden falls only on particular groups of potential aid recipients.

Similarly, Section 1113 and the regulations thereunder, when those regulations as issued are fully phased in, will require colleges and universities to change the character of their relationships with their students by forcing on them a policing role antithetical to the educational goal of

these institutions. The burden and expense of this new role, as well as the nature of that role, are unjustified by the purpose served by Section 1113. When added to the constitutional problems identified above, it is clear that this statute should not be permitted to stand.

III. CONCLUSION

Swarthmore has attempted merely to identify, without further development, the numerous constitutional and other problems inherent in Section 1113. We believe that the district court properly found two of those problems insurmountable. The totality suggests that summary affirmance of the district court's opinion is justified.

In the alternative, Swarthmore urges this Court to note probable jurisdiction and grant the opportunity for full briefing and argument. At that stage, we intend to petition the Court for leave to participate as *amicus curiae*, so that we may develop in full the arguments identified above.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER
ALAN R. HUNT
THOMAS P. PRESTON

1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6324 and 854-6237

Counsel for Swarthmore College

APPENDIX A

U. S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D. C. 20530

September 19, 1983

Dear Mr. Preston:

In response to your letter of September 14, 1983, I hereby consent to your filing a brief amicus curiae on behalf of Swarthmore College and Haverford College in *Selective Service System, et al. v. Minnesota Public Interest Research Group, et al.*, No. 83-276.

Sincerely,

/s/ Rex E. Lee
Solicitor General

DORSEY & WHITNEY
A Partnership including Professional Corporations

JAMES E. DORSEY
(612) 343-7988

September 19, 1983

Re: Selective Service System, et al.
v. MPIRG, et al.

Dear Mr. Preston:

On behalf of our clients, John Doe, Paul Poe, and Richard Roe, we consent to the filing by Swarthmore College and Haverford College of a petition to the United

States Supreme Court for leave to participate as *amici curiae* in the above action.

Very truly yours,

/s/ James E. Dorsey III

JED:pro
cc: E. Gail Suchman, Esq.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP

MPIRG

September 16, 1983

Re: No. 83-276; *Selective Service System, et al. v. Minnesota Public Interest Research Group, et al. & Bradley Boe, et al.*

Dear Mr. Preston:

On behalf of my clients, I am writing to inform you that we will have absolutely no objection to the petition of Swarthmore College and Haverford College for leave to participate as an *amicus curiae* before the United States Supreme Court in the above captioned action. In fact, we appreciate the support it represents.

Thank you for your efforts in this matter.

Very truly yours,

/s/ E. Gail Suchman

Attorney for Minnesota Public Interest Research Group, Bradley Boe, Carl Coe and Frank Foe

cc: William Keppel
Samuel Orbovich
Malcolm McDonald
William Donahue

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 83-276

IN THE

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OCTOBER TERM, 1983

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Appellees.

SELECTIVE SERVICE SYSTEM, et al.,
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v.

BRADLEY BOE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

AMICUS BRIEF OF THE UNIVERSITY OF MINNESOTA, MACALESTER COLLEGE, WAYNE STATE UNIVERSITY

PATRICIA EAMES
Vice President and
General Counsel
Wayne State University
380 Mackenzie Hall
Detroit, Michigan 48202
(313) 577-2268

STEPHEN S. DUNHAM
General Counsel
University of Minnesota
321 Morrill Hall
100 Church Street S.E.
Minneapolis, Minnesota 55455
(612) 373-3446

224-7633 — Barker Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7633

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Federal Statutes:

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IN THE

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AMICUS BRIEF OF THE UNIVERSITY OF MINNESOTA, MACALESTER COLLEGE, WAYNE STATE UNIVERSITY

AMICUS BRIEF OF THE UNIVERSITY OF MINNESOTA, MACALESTER COLLEGE AND WAYNE STATE UNIVERSITY

This amicus brief is submitted by the University of Minnesota, Macalester College, St. Paul, Minnesota, and Wayne State University, Detroit, Michigan, in support of the position of appellees set forth in their Motion to Affirm. The parties to this appeal have consented to the filing of this amicus brief.

The amici are all well known institutions of higher education which have a substantial interest in the outcome of this litigation. Each of the schools disburses substantial sums of financial aid to large numbers of students who are affected by the requirements of Section 1113 of the Department of Defense Authorization Act of 1983, Pub.L.No. 97-252, 96 Stat. 748.

All of the amici object to the requirements of Section 1113 as an unconstitutional attempt to enforce the draft registration laws through financial aid programs. The two statutory schemes have no common purpose and the imposition of one statutory scheme on the other interferes with the constitutional rights of the students that amici were created to serve. Accordingly, the amici file this brief to make the Court aware of their views and to urge the Court either to summarily affirm the decision of the district court or to note probable jurisdiction and fully review the questions presented.

The University of Minnesota is the largest public institution of higher education in the State of Minnesota. It serves over 45,000 students on five campuses with major centers located in Minneapolis and St. Paul. Affidavit of Robert Misenko, Director of Student Financial Aid, at para 4. Each year, approximately $55,000,000 in financial aid subject to Title IV of the Higher Education Act and now Section 1113 is distributed to about 20,000 students. *Id.*

Macalester College is a private liberal arts college located in St. Paul, Minnesota, serving over 1,500 students from 49 states. In 1982-83, Macalester will distribute over $1.5 million in financial aid under Title IV. Affidavit of Matthew Entenza, President, Macalester Community Council, at para 3.

Wayne State University is a major public university—one of the three constitutionally autonomous universities provided for by the Michigan constitution. It is located in Detroit and serves a predominately urban student population of 32,000, 53% of whom receive financial aid. Each year approximately twenty-one million dollars in financial aid subject to Title IV of the Higher Education Act, and now to Section 1113, is distributed to about 15,000 students.

All of the schools represented by this brief are institutions of higher education that are subject to and responsible for the implementation of Section 1113 of the Department of Defense Authorization Act of 1983. This Act and its implementing rules require each student applying for assistance under Title IV of the Higher Education Act of 1965, 20 USC § 1070 et seq. to demonstrate compliance with the draft registration laws if applicable. Since Title IV assistance is almost exclusively administered and distributed by institutions of higher education, it is left to the schools to enforce this requirement and to deny assistance if it is not met. The regulatory structure and the practicalities of financial aid distribution place schools squarely in the role of enforcing Section 1113 and consequently the draft registration laws.

While the role of enforcement is always uncomfortable, it is particularly unwelcome here where the enforcement with respect to the controversial requirement of registration is accomplished in a manner that infringes on the constitutional rights of the students. There are already independent criminal sanctions for violation of the draft laws which are being enforced.

As the district court has found, this attempt to avoid the criminal trial process results in violations of the constitutional protections against bills of attainder and the protections of the fifth amendment. Institutions of higher education should not be made the unwilling enforcers of such an unconstitutional scheme.

From a broader perspective, the lack of common purpose behind the draft registration laws and financial aid programs breeds even more difficulties when they are enforced together. The financial aid programs distribute funds to students primarily on the basis of need and financial capability. These distinctions are fair and fully justified in the context of the goals and purposes of financial aid distribution.

However, when the financial aid process becomes the vehicle for enforcement of the draft laws, the distinctions become discriminatory and unjustifiable. For example, while the discrimination between male and female may be justified for purposes of draft registration, this sex-based distinction is absolutely unrelated to or unjustified by the purposes of the financial aid laws. Moreover, since financial aid is distributed based on need and capability, the vast majority of the aid goes to the poor and middle class. Section 1113 as enforced by the financial aid process will discriminatorily enforce the draft registration requirement against the poor and middle classes which also tend to be disproportionately composed of minorities.

In the view of amici, Section 1113 is unconstitutional and involves the amici in those constitutional violations. Amici believe the well reasoned opinion of the district court judge, the Honorable Donald D. Alsop, is a correct statement of the law on both the bill of attainder and fifth amendment issues. The district court's judgment should be summarily affirmed.

Amici agree with Appellants, however, that the questions are substantial in the sense that they have major impacts on large numbers of students seeking higher education and upon the educational institutions providing that education. Thousands of students and millions of dollars will be affected each year. The imposition of unconstitutional requirements through higher educational institutions is certainly a substantial question.

Finally, if this Court notes probable jurisdiction and grants full review, amici suggest that the Court also consider two additional questions which arise from Section 1113 and were presented to the District Court. These are:

1) Whether Section 1113 violates the Equal Protection Requirements of the Fifth Amendment by Unlawfully Discriminating based on Gender;

2) Whether Section 1113 violates the Equal Protection Requirements of the Fifth Amendment by Unlawfully Discriminating based on Wealth.

As previously indicated, both of these issues arise from the overlay of Section 1113 on the financial aid programs. Their resolution at this time is not only appropriate but useful to all parties to this litigation.

Respectfully submitted,

PATRICIA EAMES
Vice President and General Counsel
Wayne State University
380 Mackenzie Hall
Detroit, Michigan 48202
(313) 577-2268

STEPHEN S. DUNHAM
Attorney for University of Minnesota and Macalester College
321 Morrill Hall
100 Church Street S.E.
Minneapolis, Minnesota 55455
(612) 373-3446

Office · Supreme Court, U.S
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No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Special Litigation Counsel
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which states that those who fail to register as required by the Military Selective Service Act shall be ineligible for assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which also states that those who wish to receive Title IV assistance and who are required to register must file a statement of registration compliance with their colleges—compels such persons to incriminate themselves in violation of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to the Selective Service System, appellants in both cases include Major Thomas K. Turnage, the United States Department of Education, and Terrel H. Bell.

In addition to the Minnesota Public Interest Research Group, the appellees in the first captioned case are individuals using the pseudonyms John Doe, Richard Roe, and Paul Poe.

In addition to the individual using the pseudonym Bradley Boe, the appellees in the second captioned case are individuals using the pseudonyms Carl Coe and Frank Foe.

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TABLE OF AUTHORITIES

Cases:

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American Communications Ass'n v. *Douds*, 339 U.S. 382	9, 10, 15, 16
California v. *Byers*, 402 U.S. 424	31
Communist Party v. *SACB*, 367 U.S. 1	13, 15, 16
Counselman v. *Hitchcock*, 142 U.S. 547	30
CSC v. *Letter Carriers*, 413 U.S. 548	18
Cummings v. *Missouri*, 71 U.S. (4 Wall.) 277	9, 14-15, 16, 22
Elfbrandt v. *Russell*, 384 U.S. 11	16
Flemming v. *Nestor*, 363 U.S. 603	10, 18, 21
Fullilove v. *Klutznick*, 448 U.S. 448	23
Garrity v. *New Jersey*, 385 U.S. 493	31

Cases—Continued: Page

Gault, In re, 387 U.S. 1 31
Helvering v. *Mitchell*, 303 U.S. 391 25
Hoffa v. *United States*, 385 U.S. 293 30
Hoffman v. *United States*, 341 U.S. 479 31
Leary v. *United States*, 395 U.S. 6 31
Lefkowitz v. *Cunningham*, 431 U.S. 801 ..... 30, 31
Lefkowitz v. *Turley*, 414 U.S. 70 31
Marchetti v. *United States*, 390 U.S. 39 31
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MPIRG v. *Selective Service System*, 557 F. Supp. 925 6
Murphy v. *Waterfront Commission*, 378 U.S. 52 31
Nixon v. *Administrator of General Services*, 433 U.S. 425 ..... 12, 19, 21, 22, 24
Noto v. *United States*, 367 U.S. 290 16
Quinn v. *United States*, 349 U.S. 155 31
Regan v. *Taxation with Representation*, No. 81-2338 (May 23, 1983) 27, 31
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San Antonio School District v. *Rodriguez*, 411 U.S. 1 22
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Constitution, statutes, and regulation:

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Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* 2, 4, 6
§ 1113, 96 Stat. 748 ..... *passim*

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Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 614 *et seq.* 5
§ 1254, 97 Stat. 700 5
Higher Education Act of 1965, Title IV, 20 U.S.C. (& Supp. V) 1070 *et seq.* 4
20 U.S.C. 1085(b) 23
20 U.S.C. 1085(c) 23
20 U.S.C. 1088 23
Military Selective Service Act, 50 U.S.C. App. (& Supp. V) 451 *et seq.*:
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§ 12, 50 U.S.C. App. (& Supp. V) 462 ..... 4, 17
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38 U.S.C. (& Supp. V) 1651 13
38 U.S.C. (& Supp. V) 1661 13
5 U.S.C. 704 29
42 U.S.C. (Supp. V) 254*l* 13
32 C.F.R. Pt. 1615 17
Proclamation No. 4771 (1980) 4, 17
45 Fed. Reg. 45247 4
45 Fed. Reg. 45248 17

Miscellaneous:

128 Cong. Rec. (daily ed. May 12, 1982):
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S4945 ..... 5, 6, 10, 26, 27
128 Cong. Rec. (daily ed. July 28, 1982):
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128 Cong. Rec. S10544 (daily ed. July 21, 1983).... 6
Department of Education, National Center for Education Statistics, *High School and Beyond* (unpublished draft 1984) 23
45 Fed. Reg. 45247 (1980) 17
48 Fed. Reg. (1983):
p. 15578, to be codified at 34 C.F.R. Pt. 668.... 5
p. 15580, to be codified at 34 C.F.R. Pt. 668.... 15, 18
p. 15580, to be codified at 34 C.F.R. 668.27(b).. 15
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p. 15583, to be codified at 34 C.F.R. 668.27(b).. 15
p. 15583, to be codified at 34 C.F.R. 668.27(b)(1) 18, 29
p. 31175 5
p. 33695 5
p. 40380 5
p. 40381 5
O. Fiss, *Injunctions* (1971) 20-21
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In the Supreme Court of the United States

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SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

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BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court upon issuance of the preliminary injunction (J.S. App. 1a-30a) is reported at 557 F. Supp. 937. The opinion accompanying the permanent injunction (J.S. App. 31a-37a) is not reported.

JURISDICTION

The jurisdiction of the district court was based on 28 U.S.C. (Supp. V) 1331. The judgments of the district court (J.S. App. 38a-41a) were entered on June 16, 1983. Notices of appeal (J.S. App. 42a-45a) were filed on June 21, 1983, and June 27, 1983. The jurisdictional statement was filed on August 19, 1983. Probable jurisdiction was noted on December 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9, Clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718, 748, provides:

> (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:
>
> "(f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or

benefit provided under title IV of the Higher Education Act of 1965.

"(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose."

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance

under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

STATEMENT

1. Section 3 of the Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453, empowers the President, by proclamation, to require the registration of every male citizen and male resident alien between the ages of 18 and 26. Its purpose is to facilitate any conscription that may eventually be necessary. See 50 U.S.C. App. 454. Section 12 of the Act, 50 U.S.C. App. (& Supp. V) 462, imposes criminal penalties for violations of the Act, including failure to register. Although draft registration was discontinued in 1975, it was reactivated by President Carter on July 2, 1980. Proclamation No. 4771, 45 Fed. Reg. 45247 (1980).

On September 8, 1982, Congress enacted and the President signed the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* Section 1113 of the Act was passed by an overwhelming bipartisan majority in each house after a full and vigorous debate. See 128 Cong. Rec. S4942-S4945 (daily ed. May 12, 1982); 128 Cong. Rec. H4756-H4772 (daily ed. July 28, 1982). It provides (96 Stat. 748) that men who are required to register and fail to do so "shall be ineligible for any form of assistance or benefit" under Title IV of the Higher Education Act of 1965, 20 U.S.C. (& Supp. V) 1070 *et seq.* It also provides that, in order to receive any "grant, loan or work assistance" under Title IV, a person required to register must file with the relevant institution of higher education a "statement of compliance" with the Military Selective

Service Act. Section 1113 directs the Secretary of Education, in agreement with the Director of the Selective Service System, to prescribe methods for verifying the statements of compliance, and to issue implementing regulations. Those regulations were issued in final form on April 11, 1983. 48 Fed. Reg. 15578 (to be codified at 34 C.F.R. Pt. 668). Section 1113 applies to Title IV aid for periods of instruction beginning after June 30, 1983.[1]

The legislative record shows that Congress enacted Section 1113 in order to encourage registration and to promote a fair allocation of scarce federal aid dollars by not rewarding those who failed to register. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4758 (remarks of Rep. Solomon); *id.* at H4769 (remarks of Rep. Montgomery); *id.* at H4770 (remarks of Rep. Stratton); 128 Cong. Rec. S4943-4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa); *id.* at S4945 (remarks of Sen. Stennis and Sen. Jepsen). Sup-

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[1] Because of the district court's preliminary and final injunctions, the regulations did not go into effect until Justice Blackmun issued a temporary stay on June 24, 1983. However, the Secretary announced a series of grace periods, extending through September 30, 1983, during which schools were permitted to disburse Title IV aid first and obtain the required statements of registration compliance later. 48 Fed. Reg. 31175, 33695, 40380 (1983). See Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1254, 97 Stat. 614, 700. This was done in order to ease the administrative burden on schools, which were able as a result to process pending aid requests in advance of securing the required statements. Beginning October 1, 1983 the schools were required to obtain statements before disbursing Title IV aid for the 1983-1984 award year. 48 Fed. Reg. 40381 (1983).

porters of Section 1113 emphasized that those who fail to register timely can still qualify for student aid by registering late. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4769 (remarks of Rep. Montgomery); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Stennis). Accordingly, the statement of compliance forms in use do not require applicants to say when they registered. See 48 Fed. Reg. 15582 (1983) (to be codified at 34 C.F.R. 668.25); 128 Cong. Rec. S10544 (daily ed. July 21, 1983).

2. On November 23, 1982, the Minnesota Public Interest Research Group (MPIRG) filed a complaint seeking to enjoin the operation of Section 1113. On January 24, 1983, the district court dismissed MPIRG for lack of standing,[2] but allowed three anonymous students (John Doe, *et al.*) to intervene as plaintiffs. *MPIRG* v. *Selective Service System*, 557 F. Supp. 923 (D. Minn. 1983); *MPIRG* v. *Selective Service System*, 557 F. Supp. 925 (D. Minn. 1983).[3] The intervenors alleged that they reside in Minnesota, that they need financial aid to pursue their education, that they intend to apply for Title IV assistance, and that they are required to register with the Selective Service System but have failed to do so (J.A. 11-12). Two days later three other anonymous students (Bradley

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[2] MPIRG appealed its dismissal to the Eighth Circuit, which transferred the appeal to this Court on August 17, 1983. MPIRG's jurisdictional statement—seeking remand to the court of appeals, or in the alternative plenary review of the issue of its standing—was docketed as of September 30, 1983, No. 83-637, and is still pending.

[3] Richard Roe, one of the intervenors, has since decided not to apply for federal aid for the 1983-1984 school term (J.S. App. 32a).

Boe, *et al.*) filed a separate action making essentially the same allegations (J.A. 24-25). The two cases were informally consolidated.

On January 28, 1983, the district court denied appellees' joint motion for a temporary restraining order (J.A. 4). But on March 9, 1983, the district court granted a preliminary injunction restraining appellants from enforcing Section 1113 (J.S. App. 1a-30a). (The district court did allow appellants to promulgate regulations pending final disposition of the two lawsuits.) The court ruled that appellees had demonstrated a sufficient threat of irreparable injury because it was "inevitable" that they would "be denied financial assistance and, consequently, the opportunity to pursue their educations" (J.S. App. 5a). The district court also found it likely that appellees would succeed on the merits in showing that Section 1113 constituted a bill of attainder and violated appellees' privilege against compelled self-incrimination.

Concerning the bill of attainder issue, the court said that Section 1113 "clearly singles out an ascertainable group based on past conduct[,]" and "legislatively determines the guilt of this ascertainable group" by "assum[ing] that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements" (J.S. App. 12a). The court identified the affected group as "non-registered students—* * * a group viewed by some as disloyal" (*id.* at 14a). It reasoned that their guilt was "legislatively determine[d]" because all who fail to submit a statement of compliance are automatically denied financial aid (*id.* at 12a). The court also viewed the denial of aid as punishment, because it "deprives students of the practical means

to achieve the education necessary to pursue many vocations in our society" (*id.* at 14a). The district court detected a "punitive intent" in the legislative record (*id.* at 18a), and rejected the government's argument that such an intent was nullified by the fact that nonregistrants could qualify for aid by simply registering late.

Concerning the self-incrimination issue, the district court found that the statement of compliance required by Section 1113 seeks information that "is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant" (J.S. App. 23a). The court believed that appellees were compelled to provide this information because they had "no option of receiving federal financial assistance in another way" (*id.* at 27a). In order to complete their education, the court stated, students are "forced" by Section 1113 "to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status" (*id.* at 28a). In the court's view, the "denial of education assistance is a sanction that makes assertion of the [Fifth Amendment] privilege costly, thereby compelling self-incrimination" (*ibid.*).

After the district court issued its preliminary injunction, the parties in both cases filed cross-motions for summary judgment and supplemental briefs, which the court took under advisement. On June 16, 1983, the court issued a memorandum order and permanent injunction (J.S. App. 31a-37a) based largely on its opinion of March 9, 1983. The permanent injunction was nationwide in scope (*id.* at 35a, 36a), despite the fact that neither action had

been certified as a class action and all the individual plaintiffs were residents of Minnesota (J.S. App. 2a).

On June 29, 1983, this Court stayed the district court's June 16 order pending the timely docketing and final disposition of this appeal.

SUMMARY OF ARGUMENT

I.A. Section 1113 has none of the attributes of a bill of attainder. Bills of attainder legislatively punish specific individuals or groups without provision for a judicial trial. Section 1113, which denies federal education aid to students who fail to register for the draft, is not directed against any specific individual or group. It neither names particular people, nor refers to past conduct in which only readily ascertainable persons have engaged and which they are powerless to change. Rather, like a variety of federal benefit provisions, it regulates present and future conduct. It grants federal aid to students who comply with the draft registration requirement, and withholds aid from those who do not.

The distinction between punishing past conduct and regulating future conduct can be seen by comparing *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867), with *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). In *Cummings* the Court found that the Bill of Attainder Clause applied to a state law forbidding people who had affiliated with the Confederacy from practicing certain professions. That law, the Court held, created a bogus qualification intended "to reach the person, not the calling." 71 U.S. (4 Wall.) at 320. *Douds*, by contrast, upheld Section 9(h) of the National Labor Relations Act, which denied certain benefits to unions whose officers failed to file affidavits disclaiming membership in the Communist Party. The "decisive distinction" between that section and the law in

Cummings was that under Section 9(h) "[p]ast conduct * * * is not a bar to" signing the affidavit and getting the benefits of the Act (339 U.S. at 413, 414).

B. Not only does Section 1113 not apply to specific individuals or groups, it also does not inflict punishment. Because anyone can avoid the disqualification imposed by the law simply by registering now or in the future, Section 1113 differs from punishment in the same way that civil contempt differs from criminal contempt. If anything, Section 1113 is even less punitive than civil contempt, since the inducement it prescribes is not prison or a fine, but "the mere denial of a noncontractual governmental benefit." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

Section 1113 is regulatory (rather than punitive) in purpose as well as effect. Congress's purpose in passing the law was to encourage registration by those who are required to register with the Selective Service System, but who have failed to do so out of inadvertence, neglect, or willful refusal. Granting Title IV assistance only to those who register is a natural way of accomplishing that goal, since the class of those seeking such aid overlaps to a very large extent with the class of those required to register. Such a distribution of education aid also promotes a fair allocation of increasingly scarce federal monies, since it rewards students who have performed the legal duty imposed on them by the Military Selective Service Act.

The legislative record of Section 1113 supports these purposes. Congress was plainly aware that the majority of those whom the bill would affect had "unintentionally failed to register." 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Solomon). It is unlikely that Congress wished to inflict harm on

a group that it knew consisted largely of innocent nonregistrants. Instead, the bill was designed to encourage such people to register in the future. As Senator Stennis said, one who "might have overlooked signing up * * * is not going to be penalized for that because he still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible" (128 Cong. Rec. S4945 (daily ed. May 12, 1982)).

C. One of the principal concerns of the Bill of Attainder Clause is that the legislature, rather than the courts, should not impose punishment on specific individuals. We have said that Section 1113 does not apply to specific individuals, and is not punitive. But neither does it dispense with judicial process in any case where it is appropriate. A hearing is provided in case of any dispute between the Secretary and an applicant about whether the applicant has registered. 96 Stat. 748 (subsection (f)(4)). And the decision made at that hearing is subject to judicial review.

Section 1113 does not rely on judicial procedures to distinguish innocent from willful nonregistrants, and Congress is concededly incapable of distinguishing between those groups through the legislative process. But the very purpose of Section 1113 makes any distinction unnecessary, since the law is not designed to punish the guilty, but to encourage *all* nonregistrants to register.

II. Appellees' argument that Section 1113 compels them to incriminate themselves by requiring them to submit statements of registration compliance is a makeweight that must fall with their bill of attainder argument. First, appellees must supply registration information only if they apply for education aid. If they do not wish to supply this information, they simply need not apply. Second, if the Court agrees with us that Section 1113 is not a bill of attainder,

and that Congress may legitimately declare nonregistrants ineligible for Title IV aid, appellees are under no "compulsion" of any kind to file statements of registration compliance, because they are ineligible for aid.

ARGUMENT

I. SECTION 1113 IS NOT A BILL OF ATTAINDER

Section 1113 is not a bill of attainder forbidden by Article I, Section 9, Clause 3 of the Constitution. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). Section 1113 does not satisfy any of these three requirements—specificity in identification, punishment, or lack of a judicial trial. See *United States* v. *O'Brien*, 391 U.S. 367, 383 n.30 (1968).

A. Section 1113 Does Not Adversely Affect A Specific And Identifiable Individual Or Group

1. By banning bills of attainder the framers sought to prohibit the infamous English and colonial practice of legislatively punishing "specifically designated persons or groups." *United States* v. *Brown*, 381 U.S. 437, 447 (1965).[4] Historically, most bills of attainder named the parties to whom they were to apply (*id.* at 441-442). A legislative act may, however, be an attainder even if the individual is

[4] At common law "bills of attainder" imposed the death sentence; legislative acts imposing lesser sanctions were known as "bills of pains and penalties." The Constitution proscribes bills of attainder and bills of pains and penalties alike. *United States* v. *Brown*, 381 U.S. at 447.

not called by name, if the act describes "conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party* v. *SACB*, 367 U.S. 1, 86 (1961). Thus a nameless target may be described by "a semantically equivalent phrase" (*United States* v. *Brown*, 381 U.S. at 455) which is "merely a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" who have engaged in "past and ineradicable actions" (*Communist Party* v. *SACB*, 367 U.S. at 87).

Section 1113 does not name any specific individuals or groups. Neither does it describe any individuals or groups by reference to their "past and ineradicable" conduct. It creates an open, not a closed, class. It permits the award of educational benefits to a statutorily defined group of persons who have taken or will take the steps (registration for the draft) necessary to comply with its conditions. Conversely, the class denied benefits is defined not by past action but on the basis of present and future choice. Congress could not possibly have intended to punish any *particular* persons by enacting such a law, because it left everyone free to escape the disqualification the law imposes.

In this respect Section 1113 is like many other federal benefit provisions. A good example is the Veterans' Benefits Act, 38 U.S.C. (& Supp. V) 1501 *et seq.* That Act grants educational benefits to persons who choose to serve in the armed forces. 38 U.S.C. (& Supp. V) 1651, 1661. It withholds those benefits from persons who do not choose to serve. See also 42 U.S.C. (Supp. V) 254*l* (National Health Service Corps Scholarship Program). Under both Section 1113 and the Veterans' Benefits Act, whether one collects or forfeits benefits turns not on past

conduct but on a continuing option to comply with statutory conditions (registration or service). It would be sophistry to argue that in passing the Veterans' Benefits Act Congress intended to punish individuals who choose not to serve in the armed forces. For precisely the same reason it is a mistake to suggest that Section 1113 is a bill of attainder.[5]

2. The district court seemed to view the denial of assistance to nonregistrants, and the right of any nonregistrant to qualify for aid by simply registering, as somehow separable portions of the statute. In the court's opinion, "[t]o say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement" (J.S. App. 12a). That argument, the court opined (*id.* at 11a), was "soundly rejected" in *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867).

But Section 1113 is quite unlike the bill of attainder in *Cummings* v. *Missouri*. That law prohibited persons from practicing certain professions unless they took an oath swearing that they had no connection with the Confederacy during the Civil War. Although the law did not name the individuals or groups to whom it applied, the Court held that by inflicting punishment for the "past act" of affiliation with the Confederacy the law created a bogus qualification intended "to reach the person, not the

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[5] The fact that military service is presently optional, while registration is a legal duty, does not lessen Congress's authority to provide incentives for registration. Congress could, after all, have provided simply that every registrant shall receive $100 when he registers (and, of course, that those who do not register shall not receive $100). The means it has chosen here is essentially no different.

calling." 71 U.S. (4 Wall.) at 319, 320. The Court added that the "expurgatory oath" provided "no escape" for those the amendment was designed to reach, since their past affiliation with the Confederacy prevented them from taking the oath without committing perjury. *Id.* at 327. As to those persons "the deprivation was intended to be, and is, absolute and perpetual" (*ibid.*).

Section 1113, by contrast, provides that an individual "*shall be* ineligible" for Title IV aid if he "*fails*" to register as required (96 Stat. 748) (emphasis added). "[C]onsistent with the statutory intent to encourage registration" (see pages 5-6, *supra*), the Secretary has issued regulations permitting "any nonregistrant who was required to register but did not * * * [to] qualify for aid * * * if he registers with Selective Service and complies with the statement and verification requirements" during the payment period for which he seeks aid. 48 Fed. Reg. 15580, 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)). Ineligibility for Title IV aid is thus "made to turn upon continuingly contemporaneous fact; [it] arise[s] only because, and endure[s] only so long as, an [individual] presently [engages in conduct] of a described character." *Communist Party* v. *SACB*, 367 U.S. at 87.

The distinction between a bill of attainder (which applies only to past conduct) and a permissible statute such as Section 1113 (which regulates present and future conduct) is well illustrated in *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). In *Douds* the Court rejected a bill of attainder challenge to Section 9(h) of the National Labor Relations Act, which denied certain benefits to unions whose officers failed to file affidavits disclaiming member-

ship in the Communist Party. The Court noted that under Section 9(h) "[p]ast conduct * * * is not a bar to" signing the affidavit and obtaining the benefits of the Act (339 U.S. at 414). "[T]here is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit" (*ibid.*). That, the Court found, was the "decisive distinction" (*id.* at 413) from cases like *Cummings*, where "the basis of disqualification was past action or loyalty," and "nothing that those persons proscribed by its terms could ever do would change the result" (*id.* at 414). Cf. *United States* v. *Brown*, 381 U.S. at 458 ("Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party.").[6]

3. Even if the Bill of Attainder Clause does not apply to a law whose operation is strictly prospective, the district court held, Section 1113 does not fit that description because it irrevocably disqualifies students who have already failed to register within 30 days of their 18th birthday (J.S. App. 12a; J.S. App. 33a-34a). That is so, the court said, because Section 1113 requires registration "in accordance with any proclamation issued under [Sec-

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[6] Whatever doubt may have been cast by *Brown* upon the validity of the holding in *Douds*, it is clear that this case presents none of the same difficulties. The "alteration of * * * loyalties" required by Section 9(h) of the NLRA entailed the abandonment of conduct that was arguably constitutionally protected. See *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Noto* v. *United States*, 367 U.S. 290 (1961). In this case, by contrast, the action required by Section 1113 is nothing more than performance of the legal duty to register.

tion 3 of the Military Selective Service Act]," and Proclamation No. 4771 requires those born after January 1, 1963 to register within 30 days of their 18th birthday (J.S. App. 33a). The court recognized that the Secretary's regulations permit late registrants to receive aid, but said that in that regard they contradicted the plain meaning of the statute, and so were void (*id.* at 34a).

It is of course possible to interpret Section 1113 as requiring registration *within the time* fixed by Proclamation No. 4771. But it is also possible to read its language ("in accordance with") as requiring, simply, registration *in the manner* required by any proclamation or regulation.[7] See Proclamation No. 4771, 45 Fed. Reg. 45248 (1980) ("Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service."); 32 C.F.R. Pt. 1615 ("Administration of Registration"). This interpretation is supported by the language of subsection (f)(4), which states that the Secretary shall issue regulations providing

> that any person to whom the Secretary of Education proposes to deny assistance * * * for failure to [register] * * * shall be given * * * not less than thirty days * * * to * * * establish[] that he has complied with the registration requirements * * *.

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[7] This is not to say that those subject to the Military Selective Service Act are free for all purposes to register whenever they please. Although failure to register within the time fixed by Proclamation No. 4771 does not disqualify the registrant for Title IV aid, it is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462. As we advised the district court, however, no registrant has ever been prosecuted for late registration.

This provision plainly gives nonregistrants 30 days, after learning of their ineligibility for Title IV aid, within which to register and qualify. The Secretary has so interpreted it. See 48 Fed. Reg. 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)(1)). See also 48 Fed. Reg. 15580 (1983).

Any other construction of Section 1113 would be perverse. The primary purpose of that section is to encourage registration by those who must register, but have not. To interpret it as unconditionally denying aid to those persons would make it impossible to accomplish that objective. Since this Court's "task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations" (*CSC* v. *Letter Carriers*, 413 U.S. 548, 571 (1973)), a proper respect for the work of Congress compels rejection of the district court's reading.

B. Section 1113 Does Not Inflict Punishment

Section 1113 does not inflict punishment within the meaning of the Bill of Attainder Clause. As this Court emphasized in *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed." *United States* v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). In order to decide whether a statute imposes punishment, thereby bringing it within the reach of the Bill of Attainder Clause, a court must determine whether: (1) any feature of the chal-

lenged statute falls within the historical meaning of legislative punishment, (2) "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes[,]" and (3) "whether the legislative record evinces a congressional intent to punish." *Nixon* v. *Administrator of General Services*, 433 U.S. at 473, 475-476, 478.

1.a. Section 1113 does not inflict any sanctions that fall within the historical meaning of legislative punishment. Indeed, it is doubtful that Section 1113 can properly be considered "punishment" in any sense of the term, since there is no one (otherwise eligible) who cannot get Title IV benefits simply by registering.[8] Section 1113 thus differs from "punishment" in the same way that civil contempt differs from criminal contempt. This Court held in *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966), that

> [w]hen [those affected] carry "the keys of their prison in their own pockets," * * * the action "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees."
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> [In this case the] sentences were clearly intended to operate in a prospective manner—to coerce, rather than punish. As such, they relate to civil contempt.

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[8] We note that Section 12(d) of the Military Selective Service Act, 50 U.S.C. App. 462(d), makes the duty to register a continuing obligation. See S. Rep. 92-93, 92d Cong., 1st Sess. 22 (1971).

Here, too the "discomforting action" threatened by the government (*United States* v. *Lovett*, 328 U.S. at 324 (Frankfurter, J., concurring)) is always contingent on the individual's future conduct.[9] Prospective operation is the hallmark of regulation, not punishment. For it is the essence of punishment that it falls on "past acts"—"[p]unishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted" (*ibid.*).[10]

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[9] We do not suggest that the parallel between Section 1113 and civil contempt is exact, though what differences there are suggest that Section 1113 is—if anything—*less* punitive. Unlike civil contempt, for example, which is directed at a specific individual, Section 1113 applies to a class whose membership is uncertain and constantly changing. Moreover, the nature of the inducement in Section 1113 (as we point out below) is entirely different from imprisonment or a fine, used to enforce civil contempt. Still a third difference is that civil contempt involves a judicial determination about what kind of behavior warrants remedial action, whereas Congress itself decided in Section 1113 that nonregistration would be a basis for withholding Title IV aid. The explanation for that difference, however, lies in Congress's constitutional authority to act by legislating general rules.

[10] This Court stated in *United States* v. *Brown*, 381 U.S. at 457 n.32 (emphasis added), that "inescapability [may not be] an *absolute* prerequisite to a finding of attainder." *Brown* itself is not proof of that proposition, since the statute there ineluctably punished past membership in the Communist Party. 381 U.S. at 438-439 n.1, 458. Still, there may be cases where a bill of attainder is found even though the affected individual is given one last chance of avoidance. See the examples cited in 381 U.S. at 457 n.32. By the same token, there are some cases where the classification as civil rather than criminal contempt admits of some doubt—*e.g.*, those where the court imposes a suspended sentence of imprisonment conditioned on future behavior. But see O. Fiss, *Injunctions* 760-

The nature of the "discomforting action" in this case also undermines appellees' claim that Section 1113 inflicts punishment. The consequence of failure to register is ineligibility for Title IV assistance. But the withholding of such a benefit is not comparable to the sanctions—such as death, imprisonment, banishment, and uncompensated confiscation of property—historically associated with bills of attainder. See *Nixon* v. *Administrator of General Services*, 433 U.S. at 473-475. Here, as with the denial of social security benefits to deportees in *Flemming* v. *Nestor*, 363 U.S. at 617, "the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the 'infamous punishment' of imprisonment * * *." [11]

b. The district court conceded that the denial of aid under Section 1113 "is not a historical punishment" (J.S. App. 14a). The court nevertheless held

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766 (1971). This case would resemble that situation (and the examples given in *Brown*) more closely if Congress had absolutely disqualified all who failed to register within a certain time—such as six months—rather than leaving open perpetually the possibility of qualifying for aid. In any event the existence of more difficult cases does not undercut the point made in text—that a focus on future rather than past conduct distinguishes regulation from punishment.

[11] Indeed, it might justly be said that appellees have less cause to complain of the deprivation here than Nestor did of the loss of social security benefits. The latter—unlike Title IV aid—"are products of a contributory system, the funds being raised by payment from employees and employers alike * * * [;] and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made." 363 U.S. at 631 (Douglas, J., dissenting).

that the denial of Title IV assistance was "punishment" because it "deprives students of the practical means to achieve the education necessary to pursue many vocations in our society" (*ibid.*). And restrictions on the right to pursue a particular vocation, the court continued, were held in *Cummings* v. *Missouri* to be punishment forbidden by the Bill of Attainder Clause (*ibid.*).

But "the logical limitations on [the district court's] nexus theory are difficult to perceive." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 37 (1973). It might with equal justice be argued that denial of social security benefits to Nestor deprived him of the wherewithal to secure medical treatment or meet mortgage payments, and so resulted in the infliction of physical harm or the loss of his home—deprivations that also would amount to punishment in the sense intended by the Bill of Attainder Clause. That approach, however, deprives of any meaning the first question posed by this Court in *Nixon* v. *Administrator of General Services* (433 U.S. at 475): whether any "feature of the challenged Act falls within the historical meaning of legislative punishment."

2.a. Section 1113 also does not impose punishment because it is obviously designed "to further nonpunitive legislative purposes." *Nixon* v. *Administrator of General Services*, 433 U.S. at 475-476. Above all, Congress stressed that the law would encourage those required to register with the Selective Service System to do so. See pages 26-27, *infra*. Conditioning Title IV assistance on registration is a natural means to that end. The Military Selective Service Act (50 U.S.C. App. (Supp. V) 453) provides for the registration of males between the ages of 18 and 26. That group is part of the very class to which Title IV assistance is offered. Such aid is available not just at

colleges and universities, but also at numerous kinds of business, trade, technical, and vocational schools. See 20 U.S.C. 1085(b), (c), 1088. Of the high school class graduating in 1980, nearly 60% of the male graduates enrolled in some form of post-secondary education before March 1982. Department of Education, National Center for Education Statistics, *High School and Beyond* 12-13 (unpublished draft 1984). Thus the class of individuals seeking student aid overlaps to a great extent the class of those required to register.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce * * * private parties to cooperate voluntarily with federal policy.

Fullilove v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

Section 1113 also promotes a fair allocation of increasingly scarce federal aid dollars by rewarding with Title IV assistance only those students who have performed the legal duty imposed on them by the Military Selective Service Act. See 128 Cong. Rec. S4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa).[12] Finally, Section 1113 directly assists the Selective Service System in its enforcement of the

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[12] This "fairness" justification will be more persuasive still in the event a draft should become necessary. For in that case giving aid to nonregistrants who are subject to the draft will amount to financing an activity (attending school) in which they are not legally entitled to engage (since they should be performing military service).

registration requirement of the Military Selective Service Act. The government cannot rely solely on criminal prosecution to enforce registration, any more than it can rely on criminal prosecution to enforce other federal laws. It is legitimate for Congress to devise alternative legislative means, such as Section 1113, to promote maximum compliance with the registration requirement in order to meet the important national defense goals that underlie it. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64-69 (1981).

b. The district court concluded that Section 1113 failed "[t]he second element of the *Nixon* three-part test" (J.S. App. 15a), because (*id.* at 16a):

> It * * * assumes nonregistrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes.

In saying that Section 1113 "assumes nonregistrants possess guilty intent," the district court apparently meant to suggest that by focusing on state of mind Congress indicated a primary concern with something other than "nonpunitive legislative purposes." *Nixon* v. *Administrator of General Services*, 433 U.S. at 475-476. The difficulty with this conclusion is that the sponsor of the bill himself said it would apply for the most part to innocent nonregistrants (128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Solomon))—a perfectly sensible application when one considers that its purpose is to offer such persons a reminder and inducement to register. It seems unlikely that Congress wished to inflict punishment on a group that it knew consists largely of people who have "unintentionally failed to register" (*ibid.*).

For the same reason there is little substance to the court's conclusion that Section 1113 "promotes the aims of retribution and deterrence, * * * and is excessively broad in relation to its alternative purposes" (J.S. App. 16a). In holding the statute overbroad, the court recognized that it "applies to those who have inadvertently failed to register as well as to those who have intentionally failed to register" (*ibid.*). That being so, one wonders why the court did not reexamine its conclusion that the statute's aim was retributive. The point is, of course, that if one understands that the statute's purpose is not to punish the guilty, but to encourage registration by innocent and guilty alike, then it follows that it is no broader than it has to be.

It is true, as the court pointed out, that Section 1113 "applies to behavior that is already a crime" (*ibid.*). But because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), "that indication is not as strong as it seems at first blush." *United States* v. *Ward*, 448 U.S. 242, 250 (1980). Given Congress's clear intent to allow anyone—even willful nonregistrants—to get Title IV aid by the simple act of registering, it is hard to conclude from this fact alone that the real purpose behind Section 1113 is punitive.[13]

3.a. The legislative record supports the nonpunitive purposes just discussed. The debates on Section

[13] *Ward* itself dealt with a law imposing a $5,000 penalty for conduct made criminal by another statute. The Court nevertheless concluded that that fact alone, absent other indications, was "in no way sufficient to render unconstitutional congressional classification of the penalty * * * as civil" (448 U.S. at 250-251).

1113 clearly show Congress's conviction that most of those who would be affected by the law had failed to register for entirely innocent reasons. Representative Solomon, the House sponsor of the bill, introduced it by saying that "[t]here are some 700,000 young men in this country who have, for the most part, *unintentionally* failed to register" (128 Cong. Rec. H4757 (daily ed. July 28, 1982) (emphasis added)). See also *ibid.* (remarks of Rep. Solomon) ("who have either intentionally or unintentionally chosen not to register"); *id.* at H4759 (remarks of Rep. Simon) ("a lot of them probably do not even know about it"); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Stennis); *ibid.* (remarks of Sen. Durenberger) ("In many cases, this is due to a simple lack of understanding or awareness.").

Consistent with that conviction, Congress made equally evident its intent that the law should give innocent and willful nonregistrants alike the right to benefits whenever they registered. Senator Stennis made the point most forcefully (*ibid.*):

> I thought of the proposition here where some youngster might have overlooked signing up or might have misunderstood it or had not been correctly informed, but he is not going to be penalized for that because he still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible so far as this prohibition or restriction is concerned.

See also 128 Cong. Rec. H4769 (daily ed. July 28, 1982) (remarks of Rep. Montgomery) ("they are not eligible until they register and * * * if they do register then they would be eligible for these funds").

Taken together, these facets of the law undermine any claim that its objective is punitive. Its purpose, instead, is to encourage registration. As Sen-

ator Jepsen, one of the Senate sponsors, stated (128 Cong. Rec. S4945 (daily ed. May 12, 1982)):

> I also point out that the chief purpose of the amendment is to encourage greater compliance with the registration requirement. Registration is the law of the land. And this amendment is not meant to punish as many nonregistrants as possible.

See also 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4758 (remarks of Rep. Solomon) ("I just think this is going to be an additional encouragement"); *id.* at H4770 (remarks of Rep. Stratton) "It is a method * * * to encourage young people * * * to comply with the law").

Still another purpose of Section 1113, as the debates reveal, is to promote a fair allocation of federal aid dollars by rewarding those students who have performed the legal duty imposed on them by the Military Selective Service Act—much as Congress has chosen to reward those who enlist in the armed forces by the provision of veterans' benefits. See also *Regan* v. *Taxation with Representation*, No. 81-2338 (May 23, 1983). As Senator Hayakawa stated (128 Cong. Rec. S4943-S4944 (daily ed. May 12, 1982)):

> This amendment seeks not only to increase compliance with the registration requirement but also to insure the most fair and just usage of Federal education benefits. During these times of extreme budgetary constraints, times when even the most worthwhile programs are cut back drastically, this Government has every obligation to see that Federal dollars are spent in the most fair and prudent manner possible.

b. The district court cited several passages from the debate on the bill in which members of Congress

expressed their displeasure with those young men who had willfully refused to register (J.S. App. 17a-18a). It would of course be surprising if discussion of a measure designed to encourage future compliance with the law by a group that includes at least some self-proclaimed law-breakers did not evoke sentiments of that kind. But the issue is not whether Congress was indignant about past acts of defiance, but whether it intended—in Section 1113—to punish those past acts. As the debates make evident, the aim of the bill is to deny Title IV aid only to those individuals—innocent and willful alike—who persist in failing to register in the *future*. And an intent to make future lawlessness (as well as future carelessness) unattractive is simply not an intent to punish within the meaning of the Bill of Attainder Clause.

C. Section 1113 Does Not Supplant The Judicial Process

A central concern of the Bill of Attainder Clause is "that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States* v. *Brown*, 381 U.S. at 445. The thought is that both the " 'numbers and organization' " of the legislature, and its " 'susceptib[ility] to popular clamor' " (*ibid.*, quoting 1 T. Cooley, *Constitutional Limitations* 536-537 (8th ed. 1927)), will lead to inaccurate decisions based on prejudice or blunder. But there is in this case no claim that Section 1113 inaccurately separates those who have registered from those who have not. After all, the initial classification is made by the applicant himself, who simply files a statement that he has registered. The statute

(subsection (f)(3)) and the regulations (48 Fed. Reg. 15582 (1983), to be codified at 34 C.F.R. 668.26) do provide a method for verification. But in the event of disagreement between the applicant and the Secretary, the statute provides "an opportunity for a hearing to establish * * * compliance" (subsection (f)(4); see also 48 Fed. Reg. 15583 (1983), to be codified at 34 C.F.R. 668.27). The decision made at that hearing is in turn subject to judicial review. 5 U.S.C. 704.

Section 1113 does not distinguish guilty from innocent nonregistrants, and we freely concede that Congress does not possess the power to sort out those two classes and impose punishment on the former. But Congress neither attempted nor wished to do that. It did not decide that willful nonregistrants should be punished. Its purpose was instead to provide an inducement for *all* nonregistrants to register. For that reason there is no need—indeed, it would be irrational—to distinguish among classes of nonregistrants. And because Congress, for legitimate reasons, wished to treat the two classes alike, there is simply no role for the courts to play in sorting them out.

II. SECTION 1113 DOES NOT COMPEL APPELLEES TO INCRIMINATE THEMSELVES IN VIOLATION OF THE FIFTH AMENDMENT

The district court found that Section 1113 violates appellees' Fifth Amendment privilege by denying Title IV assistance to nonregistrants who refuse, from fear of self-incrimination, to submit a statement of compliance. That denial, the court found,

penalized their exercise of the privilege (J.S. App. 28a).[14] This conclusion is specious.

The primary objective of the privilege against compelled self-incrimination is to "insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). The compulsion requirement "comes directly from the constitutional language directing that no person 'shall be *compelled* in any criminal case to be a witness against himself.'" *South Dakota* v. *Neville*, No. 81-1453 (Feb. 22, 1983) (emphasis in original), slip op. 9. Absent compulsion, the privilege does not attach. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977); *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966).

Here there is no compulsion. Appellees have the option of simply not applying for federal aid, and so furnishing no information whatever to the govern-

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[14] Appellees have also asserted (Motion to Affirm 13) that Section 1113 violates the privilege in a second way: those nonregistrants who do execute a statement, but assert their privilege rather than affirm or deny registration, are forced to incriminate themselves by the very act of claiming the privilege. This suggestion is frivolous. Since an applicant may not receive Title IV aid without *affirming* that he has registered, and since nonapplicants need not execute the form, it is quite unlikely that anyone would pursue the pointless and self-destructive course of action appellees envision. In any event, appellees' point seems to be that by claiming the privilege such a benighted applicant would alert federal authorities to the fact that he had something to hide. But if that is so, it does not distinguish him from anyone else who might claim the privilege under any other circumstances. The Fifth Amendment does not protect a claimant against suspicions aroused by his silence; it only assures him that he need not condemn himself out of his own mouth.

ment. The cases relied on by the district court, on the other hand, each involved a summons, subpoena, or other form of legal compulsion to provide information to the government.[15]

There is a second, and more obvious, reason why appellees are not compelled to incriminate themselves. The district court found that Section 1113 forces them to choose between self-accusation and loss of Title IV aid, and that the threat of deprivation is sufficiently coercive to violate their Fifth Amendment privilege (J.A. App. 27a-28a). But Section 1113 states that one who has not registered is not entitled to Title IV aid at all, whether he advises the government of his failure to register or not. That is a decision which, as we made clear in our discussion of bills of attainder, Congress is authorized to make. See also *Regan* v. *Taxation with Representation, supra.* The "compulsion" envisioned by the district court is

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[15] *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977) (grand jury subpoena); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (grand jury subpoena); *California* v. *Byers*, 402 U.S. 424 (1971) (statutory requirement to stop and report car accident); *Leary* v. *United States*, 395 U.S. 6 (1969) (statutory requirement to pay marijuana transfer tax); *Marchetti* v. *United States*, 390 U.S. 39 (1968) (statutory requirement to register and pay wagering tax); *In re Gault*, 387 U.S. 1 (1967) (juvenile defendant); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (subpoena duces tecum and order to testify at judicial inquiry); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (Attorney General's inquiry ordered by state supreme court); *Albertson* v. *SACB*, 382 U.S. 70 (1965) (statutory registration requirement); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) (subpoena to testify before Waterfront Commission); *Ullman* v. *United States*, 350 U.S. 422 (1956) (grand jury subpoena); *Quinn* v. *United States*, 349 U.S. 155 (1955) (summons to testify before congressional committee); *Hoffman* v. *United States*, 341 U.S. 479 (1951) (grand jury subpoena).

thus nonexistent, since it is inconceivable that one is compelled in any way to apply for benefits for which he is ineligible. Appellees are no more forced to choose between self-accusation and loss of Title IV aid than they are forced to choose between self-accusation and loss of veterans' benefits; they simply have no right whatever to either form of assistance. If we are correct in believing that Section 1113 is not a bill of attainder, then the district court's Fifth Amendment holding has the untoward effect of enabling appellees to raid the federal treasury for money to which they are not entitled.[16]

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[16] We doubt that Congress entertained any intention of requiring applicants for Title IV aid to provide statements that they had registered with the Selective Service System if registration is not a relevant qualification for Title IV assistance. Thus subsection (f) (2) is not severable from subsection (f) (1); and if we are mistaken in our conviction that the latter is not a bill of attainder, then the statement of compliance requirement would fall as well. The Fifth Amendment issue consequently has no independent significance.

CONCLUSION

The judgment of the district court should be reversed.[17]

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Special Litigation Counsel

JANUARY 1984

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[17] Since the district court's nationwide injunction has been stayed (see note 1, *supra*), and since this Court's decision will definitively resolve the issues in this case, we need not rehearse here our objections to the scope of the injunction. See J.S. 19-21. We feel compelled nonetheless to reiterate our concern with the procedure followed by the district court in issuing that order without a class certification.

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No. 83-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP and JOHN DOE, PAUL POE, and RICHARD ROE,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

BRADLEY BOE, CARL COE, and FRANK FOE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLEES

E. Gail Suchman
Minnesota Public Interest Research Group
2412 University Avenue Southeast
Minneapolis, Minnesota 55414
(612) 376-7554
Counsel for Appellees Bradley Boe, Carl Coe, and Frank Foe

William J. Keppel, Counsel of Record
James E. Dorsey III
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2745
Counsel through the Minnesota Civil Liberties Union and the American Civil Liberties Union for Appellees John Doe, Richard Roe, and Paul Poe

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Of Counsel:
Amy M. Silberberg
Minnesota Civil
Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414
Telephone: (612) 378-2436
Charles S. Sims
Burt Neuborne
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
Telephone: (212) 944-9800

QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which punishes without trial men who have not registered in compliance with the Military Selective Service Act by denying them all forms of financial assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which requires applicants for Title IV assistance to state whether they have complied with the registration requirements of the Military Selective Service Act—violates the Fifth Amendment's protection against compelled self-incrimination.

3. Whether Section 1113—which seeks to enforce the registration requirements of Military Selective Service Act only against nonregistrants who are in need of financial assistance—denies equal protection under the law as guaranteed by the Fifth Amendment.

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Anderson, *The Military Draft* (Hoover Press, 1982) .. 45
Black's Law Dictionary 16 (West 1979) 16
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III Hamilton, *History of the Republic of the United States* 34 (1959) 10
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Levy, Origins of the Fifth Amendment 330-31 (1965) 32
McCaffrey, F., *Statutory Construction* 38 (1953) 17
Oxford English Dictionary 62 (Oxford 1933) 16

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-276

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, and JOHN DOE, RICHARD ROE, and PAUL POE,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

v.

BRADLEY BOE, CARL COE, and FRANK FOE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLEES

STATEMENT

This is a direct appeal from the final judgment and decree entered on June 16, 1983, by the United States District Court for the District of Minnesota, declaring Sec-

tion 1113 of the Department of Defense Authorization Act of 1983 unconstitutional and enjoining its enforcement. Appellees generally accept appellants' version of the procedural history of the case presented in their Brief at 4-9. However, appellees take exception to appellants' analysis and characterization of the legislative history of Section 1113.

Section 1113 was never considered by any committee in either the House or Senate, which qualifies the impression created in appellants' statement that Section 1113 was carefully considered before passage. Moreover, as will be discussed further *infra*, the legislative record demonstrates that Congress enacted Section 1113 to punish those who have not registered with the Selective Service System. Supporters of Section 1113 emphasized again and again their displeasure with those young men who had violated the "law of the land" by not registering.

Additionally, appellees note that none of the operative facts set forth in their complaints have changed. Each of them is a male Minnesota resident who wishes to further his post-secondary education but who needs financial aid. The careeer plans of each require a college degree. Each of them has made a conscientious decision not to comply with the registration requirements of the Military Selective Service Act. None is currently receiving any form of federal financial assistance.

Section 1113, which limits benefits provided by Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1001 *et seq.*, is inconsistent with the purposes of that Act. The increasing costs of post-secondary education and growing numbers of academically qualified students who could not afford it, with the consequent loss to the United States of potentially productive highly trained members of society

and impairment of its academic institutions, led to the passage of the Higher Education Act.[1]

Under the Act students who are to receive federal aid are not to be designated or selected in any way by the United States, except as provided by definitions with respect to financial need. Higher Education Act of 1965 § 484, as added by Pub. L. No. 96-374 [94 Stat. 1448 (1980)], 20 U.S.C. 1091. *See, e.g.*, H. R. Rep. No. 96-520, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3182. Furthermore, Congress decided "that colleges and universities must continue to exercise the crucial judgments not only as to which students are to be selected for grants, but also how financial support will be reported." S. Rep. No. 673, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 4056.

SUMMARY OF ARGUMENT

I. Section 1113 is a bill of attainder. U.S. Const. art. I, §9, cl. 3. A statute is an unconstitutional bill of attainder if it: (1) determines the guilt of an individual or identifiable group; (2) inflicts punishment upon that individual or group; and (3) inflicts punishment without the protection of a judicial trial. *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). Section 1113 meets these criteria.

A. Section 1113, by denying federal financial aid to students unless they prove compliance with draft regis-

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[1]Higher Education Act of 1965 §§ 401(a), 402, 404(b)(3) and (4), 421(a), 428(a)(1) [79 Stat. 1219 (1965)]; S. Rep. No. 673, 89th Cong., 1st Sess. *passim* (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 4027-4141; H. R. Rep. No. 621, 89th Cong., 1st Sess. *passim* (1976).

tration requirements, is directed at an easily identifiable group of male students who have not registered in accordance with the Selective Service Act yet need financial aid to complete their college educations. In that regard, Section 1113 parallels precisely the amendment that was struck down in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (directed at confederate doctors, lawyers and clergymen; prohibiting them from practicing their professions unless they swore they had taken no part in the Confederacy), and the statute in *United States v. Brown*, 381 U.S. 437 (1965) (directed at communist labor union officers; prohibiting members of the communist party from holding union office).

Nevertheless, appellants argue that Section 1113 is not a bill of attainder because it permits students to register at any time and still be eligible for financial aid. Section 1113 expressly mandates that students who have not registered pursuant to Section 3 of the Selective Service Act—which requires, *inter alia*, registration *not later than 30 days after* the registrant's 18th birthday—shall be ineligible for any federal aid. Appellants persist in the face of its clear language to argue that Section 1113 allows for late registration by referring to implementing regulations, 34 C.F.R. Part 668, and to statements made during floor debates. The regulations are wholly inconsistent with the clear wording of Section 1113 and can only be viewed as a *post hoc* attempt to cure an otherwise unconstitutional statute. Moreover, the legislative history provides little support for appellants' contention. For these reasons, the statute punishes the past acts of a clearly identifiable group of individuals.

B. Section 1113 inflicts punishment. To determine whether a sanction constitutes punishment in the context of a bill of attainder challenge, the Court may consider three factors: (1) whether the sanction is similar to traditional forms of punishment; (2) whether the law, viewed in light of its restraints, can be said to further non-punitive purposes; and (3) whether there was congressional intent to punish. *Nixon*, 433 U.S. at 473-78.

The Section 1113 sanction is similar to sanctions which this Court has historically struck down as punitive under bill of attainder analysis. *See, e.g., United States v. Lovett*, 328 U.S. 303 (1946). Given the ever-growing importance of education to individuals in our society, the denial of financial aid and consequential deprivation of an opportunity to pursue one's education and career constitutes punishment.

Appellants argue that Section 1113 serves to encourage draft registration compliance and to promote the just allocation of scarce federal aid dollars. Section 1113 instead serves the two goals of punishment—retribution and deterrence—by mandating the deprivation of aid to which nonregistrants would otherwise be entitled. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-9 (1963). As the district court concluded, under appellants' strained interpretation of Section 1113, "every punishment could be renamed an 'encouragement' thereby escaping the Constitution's proscription on bills of attainder." J.S. App. at 16a. Similarly, merely because a statute apportions resources does not distinguish it from punishment in a bill of attainder. Otherwise, Congress could deprive disfavored individuals of government largess without restraint.

Finally, the legislative record is riddled with statements

that evince an intent to punish, and Section 1113 does so effectively.

C. Section 1113 supplants the judicial process by punishing an identifiable group by legislative action. Such a statutory scheme, which automatically imposes a sanction without meaningful judicial intervention, falls precisely within the bill of attainder prohibition. Section 1113 is a constitutionally proscribed bill of attainder because it was intended to and clearly does punish an identifiable group without the protections of a trial.

II. Section 1113 violates the Fifth Amendment's protection against self-incrimination in two ways. First, the statute penalizes those who assert the privilege by denying them access to funds to pursue their educations. Second, the statute's scheme of operation serves to incriminate those who choose to assert their privilege, and also those who register late, in both cases providing notice to enforcement officers that the student is in violation of the law.

A. Section 1113 compels self-incrimination. Whether compulsion exists is determined by focusing on the consequences of invoking the privilege, *i.e.*, whether a penalty or sanction attaches. *Spevack v. Klein*, 385 U.S. 511, 514 (1966). This Court has found the threatened loss of employment, right to contract, reputation, or political office to be inherently coercive, and thus to provide the necessary compulsion. Similarly, Section 1113, by depriving students of finanical aid necessary for them to attend college and consequently to pursue their chosen careers, compels self-incrimination.

Appellants contend that there is no compulsion present here because students have a choice whether or not to

apply for financial aid. However, as this Court found in *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967), and as the district court adopted, "where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other."

B. Section 1113 also violates the Fifth Amendment because it incriminates even those who assert the privilege against self-incrimination. Section 1113 directs that there be established procedures by the Department of Education for verifying registration status. The implications of an applicant's assertion of his Fifth Amendment rights are clear. The Selective Service System will be put on notice that the applicant is in violation of the law. As the district court found, "[t]he information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant." J.S. App. at 23a.

In attempting to remove Section 1113 from the scope of the bill of attainder prohibition, appellants argue that late registration is allowed for purposes of eligibility for financial aid. Appellants concede, however, that late registration is still a crime punishable by fine and imprisonment. These "late registrants" who apply for financial aid will therefore incriminate themselves.

III. Section 1113 violates the Fifth Amendment right to equal protection under the law because it discriminates on the basis of wealth. It is an enforcement statute which affects only economically vulnerable young men. Wealthy young men are immune from its reach and are subject to the traditional criminal process. Furthermore, Section 1113 establishes a wholly unnecessary burden and penalty on

those who cannot afford to attend college without such assistance, thus limiting access of less wealthy nonregistrants to education.

ARGUMENT

INTRODUCTION

When Congress decided to use the federal student financial assistance program to enforce the Selective Service Act, it embarked on a course fraught wtih constitutional perils. Ordinarily, our legal system relies on criminal sanctions, imposed after trial and conviction, to ensure compliance with our penal laws. In enacting Section 1113, however, Congress elected to by-pass judicial trial and to proceed directly to the punishment phase by denying student aid funds to an economically vulnerable segment of our youth who cannot—or will not—certify that they have complied with the registration requirements of the Selective Service Act. Congress' decision to bar financial assistance to needy students who cannot—or will not—submit a certification is inconsistent with at least three significant constitutional conditions.

First, it constitutes the imposition of legislative punishment without trial for the violation of a penal statute. Thus, to the extent that Section 1113 acts to bar persons who failed to register for the draft within 30 days of their 18th birthday from access to federal financial aid needed to complete their educations, it cannot be distinguished from the test oath programs aimed at supporters of the Confederacy that were invalidated as bills of attainder in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

Second, it violates deeply rooted Fifth Amendment values which forbid the government from forcing its citizens to submit to test oaths as a law enforcement technique. Indeed, the very purpose of the ban on self-incrimination was to prohibit the practice of forcing citizens to swear or certify that they had not violated the law.

Moreover, to the extent the government seeks to distinguish Section 1113 from the post-Civil War test oaths invalidated in *Cummings* and *Garland*, it merely exacerbates the Fifth Amendment violation. If, as the government argues, Section 1113 can be read beyond its literal terms to permit a student to avoid its impact by late registration, the very act of confessing to late registration constitutes a self-incriminatory admission for which the government has been careful to deny immunity. Thus, unless the government is prepared to immunize such information in order to foreclose its use in a criminal prosecution, the Amendment is caught between the Scylla of the Bill of Attainder Clause and the Charybdis of the Fifth Amendment.

Third, limiting access to education of economically vulnerable students and singling them out for special law enforcement attention violates our Nation's commitment to the equal protection of the laws. The most fundamental aspect of our system of law is its equal applicability to rich and poor alike. The obligation to defend the Nation is one that knows no economic distinction. Yet by unleashing an enforcement scheme which impacts only on the poor while leaving the rich wholly unscathed, Congress has established a dual system for the enforcement of the Selective Service Act which, by its terms, operates on the basis of wealth. While we have progressed from the days of the Civil War draft when wealthy Americans

were permitted to purchase substitutes, we cannot tolerate any Selective Service enforcement system which operates more harshly on the poor than on the rich.

I. SECTION 1113 CONSTITUTES A BILL OF ATTAINDER.

The first article of the United States Constitution declares that "No Bill of Attainder or Ex Post Facto Law shall be passed. . . ." U.S. Const. art. I, § 9, cl. 3.

This prohibition denies legislatures the ability to presume an individual or designated group of individuals guilty of a crime and to inflict punishment without judicial process. *United States v. Brown*, 381 U.S. 437, 442 (1965); *United States v. Lovett*, 328 U.S. 303, 318 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

The prohibition against bills of attainder was drafted by the Constitutional framers who were well aware of how legislative action was used to punish the "disloyal" in eighteenth century England.[2] Thus, this Court recognized:

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[2] II Wooddeson, *A Systematical View of the Laws of England* 638 (1792). *See* Chafee, Jr., *Three Human Rights in the Constitution of 1787*, at 103-18 (1956).

The rationale of the framers was expressed by Alexander Hamilton:

> Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by Acts of the legislature. The dangerous consequences of this power are manifest . . . [I]f [the legislature] may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense.

III Hamilton, *History of the Republic of the United States* 34 (1959).

"When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned, and they proscribed Bills of Attainder." *Lovett*, 328 U.S. at 318.

This Court most recently defined bills of attainder in *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977), as legislation which: (1) determines guilt of an individual or identifiable group; (2) inflicts punishment upon that individual or group; and (3) inflicts punishment without the protections of a judicial trial. Section 1113 meets these criteria for classification as a bill of attainder.

A. Section 1113 Legislatively Determines the Guilt of an Identifiable Group.

A bill of attainder is legislation that targets a specific individual or group.[9] For example, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), concerned a post-Civil War amendment to the Missouri constitution targeting confederate doctors, lawyers, and clergymen by requiring all doctors, lawyers, and clergymen to swear an oath that they had no connection with the Confederacy. Failure to swear truthfully the required oath resulted in automatic disbar-

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[9]It is not required that the proscribed bill of attainder identify offenders by name or specifically declare their guilt. *Cummings, supra; Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1967). Rather, the constitutional proscription has been broadly interpreted:

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of power, a general safeguard against legislative exercise of the Judicial function, or more simply — trial by legislature.

United States v. Brown, 381 U.S. 437, 442 (1965).

ment from one's vocation. Cummings, a priest, refused to take the test oath and challenged his disbarment from his chosen vocation.

In striking down the Missouri amendment as an unconstitutional bill of attainder, this Court found that it "presume[s] the guilt of priests and clergymen, and adjudge[s] the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, [the State Legislature] assume[s] the guilt and adjudge[s] the punishment conditionally." 71 U.S. (4 Wall.) at 325.

A century later, this Court was faced with another bill of attainder in *United States v. Brown*, 381 U.S. 437 (1965), where § 504 of the Labor-Management Reporting and Disclosure Act of 1959 prohibited past or present members of the Communist Party from holding offices in labor unions. The purported purpose of this legislation was to protect the national economy by minimizing the danger of political strikes. Reaffirming the reasoning of *Cummings*, this Court found at 449-50:

> Under the [Cummings-Garland-Lovett] line of cases [§ 504] plainly constitutes a bill of attainder [for it] does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office . . . members of the Communist Party.

Section 1113 is specifically directed at a group in much the same way as Missouri's constitution was directed at confederate doctors, lawyers and clergymen in *Cummings* and the Labor-Management Reporting and Disclosure Act was directed at Communist labor union officers in *Brown*. In both of these cases, the legislation in question required that members of the targeted groups take affirmative action, in the form of an oath or confirmation, in order to escape the presumption of guilt placed upon them by the legislative action. Similarly, Section 1113 targets young male students who need financial aid to complete their college educations but have not fully complied with draft registration requirements. The provision requires every student who must register for the draft to submit a statement of compliance in order to escape the presumption of guilt for his act of nonregistration.[4] Obviously, as in *Cummings* and *Brown*, members of the targeted group are not able to escape because they cannot truthfully respond in an oath or statement, and thus, punishment ensues. This is precisely how a bill of attainder such as Section 1113 works.

Appellants argue that Section 1113 differs from the legislation addressed in *Cummings* and *Brown*, and therefore does not constitute a bill of attainder, because it does not target persons who have engaged in "past or inera-

[4]Although Section 1113's requirement of a statement of compliance applies only to individuals who are required to register under Section 3 of the Military Selective Service Act, 50 U.S.C. App. § 453, the regulations promulgated under Section 1113 require submittal of the statement by all students, including women and men of all ages. *See* 34 C.F.R. § 668.24, 48 Fed. Reg. 15584 (April 11, 1983). The regulations therefore exceed the delegation of authority under the statute and are void on this basis.

dicable" conduct. Appellants claim that Section 1113 leaves "everyone free to escape the disqualification the law imposes," and therefore it is similar to the legislation found to be constitutional in *American Communications v. Douds*, 339 U.S. 382 (1950). Appellants' Brief at 13-15.[5] Appellants' assertions fail for two reasons.

First, the continuing vitality of *Douds* is in serious doubt in light of the Court's more recent decision in *Brown* which invalidated the successor to the legislation considered in *Douds*.[6] In *Brown*, the Court stated that evil or illegal conduct could not automatically be attributed to members of the Communist Party as was the effect of the legislation in both *Brown* and *Douds*. Therefore, the emphasis in *Douds* on whether an individual could "escape

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[5]Appellants in their Brief at 13-14 attempt to analogize the operation of Section 1113 to the Veterans Benefits Act, 38 U.S.C. § 1651 *et seq.*, which provides educational assistance to those who served honorably, by choice or under draft, in a branch of the Armed Services. Appellants are correct in pointing out that this benefit is not available to those have not served. However, the stated purposes of the Act include making the service "more attractive," compensating for "lost educational opportunities" to those whose lives have been interrupted or impeded by military service, and assisting in the attainment of "vocational and educational status which they might normally have aspired to and obtained had they not served their country." 38 U.S.C. § 1651. All these purposes are related to military service or the consequences thereof. How this Act relates to Section 1113 is difficult to ascertain. Young men at a certain age *are required by law* to register for the draft, subject to criminal penalties for noncompliance. Section 1113 involves an assumption of guilt of the crime of nonregistration and imposes a punishment totally unrelated to the crime. These are the criteria that transform a simple conditional benefit into a bill of attainder.

[6]A three-judge plurality in *Douds* upheld the constitutionality of Section 9(h) of the Taft-Hartley Act which conditioned a labor union's access to the National Labor Relations Board upon the filing of affidavits by the union's officers attesting that they were not members of the Communist Party at that time.

disqualification" is now of little consequence in bill of attainder analysis. Indeed, appellants recognize in their Brief at 16, n. 6, that the validity of Douds is in question.[7]

Second (assuming, *arguendo*, that *Douds* still has some precedential value), unlike the legislation in *Douds*, Section 1113 *on its face* singles out an identifiable group based on *past conduct*. Section 1113 *unambiguously* provides:

> (f) (1) Any person who is required *under Section 3* [of the Military Selective Service Act, 50 U.S.C. App. § 453] to present himself for and submit to registration *under such section* and fails to do so in accordance with any rule or regulation issued *under such section*, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

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[7]Congress assumed in the *Douds* statute that Communists were likely to cause trouble within unions and therefore no members of the Communist party should hold union offices. Even though the Court in *Douds* found that a union officer's ability to leave the Communist Party saved the applicable statute, the Court in *Brown*, 381 U.S. at 458, in no way supports that result:

> Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes — that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . [in the future] and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.

See also Bryson v. United States, 396 U.S. 64, 75-76 (1969) (Douglas J., dissenting) ("Whatever may be said technically about any remaining vitality of the *Douds* case, it obviously belongs to a discredited regime, though, like *Plessy v. Ferguson*, 163 U.S. 537, it has never been officially overruled.")

(Emphasis added). The operative Presidential Proclamation issued under Section 3 requires, *inter alia,* that all male citizens born after January 1, 1963, *must* register within *thirty* days before or after they reach their eighteenth birthday. Proc. No. 4771, 45 Fed. Reg. 45247 (July 2, 1980). Failure to register *within that period of time* is a crime punishable upon conviction with a sentence of up to five years in prison and a fine of up to $10,000; failure to register within the time period creates a permanent status which cannot be expunged merely by subsequent registration. Hence, Section 1113 sanctions a "past and ineradicable" act.[8]

Appellants concede that Section 1113 may be interpreted as requiring registration *within the time* fixed by Proclamation No. 4771, but nonetheless ask the Court to interpret the language "in accordance with" contained in Section 1113 to mean merely "in the manner." In this "postmortem" attempt to save the statute, appellants thus claim that it is possible to construe Section 1113 to allow late registration. Appellants' Brief at 17. No court, dictionary or other authority has been found which defines "in accordance with" as "in the manner."[9] But even if this

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[8] *See United States* v. Martin, 557 F.Supp. 581 (N.D. Iowa 1982), where the court found that the law imposes no continuing duty to register beyond the period provided for in Presidential Proclamation No. 4771 and a person may be prosecuted for not registering within the specified period. An appeal is pending.

[9] *See, e.g., The State ex rel. Pizone v. City of Cleveland,* 295 N.E. 2d 408, 411 (Ohio 1973) (defining "in accordance with" as "in substantial conformance with," allowing a more stringent interpretation but not a lesser one); *City and County of San Francisco v. Boyd,* 140 P.2d 666, 668 (Cal. 1943); *City of Norfolk v. Norfolk Landmark Publishing Co.,* 28 S.E. 959, 960 (Va. 1898); 20A Words and Phrases, Perm. Ed. 23-25 (1983); *Oxford English Dictionary* 62 (Oxford 1933); *Black's Law Dictionary* 16 (West 1979).

definition is accepted by the Court, it could not change the meaning of Section 1113, which *expressly* requires compliance with Section 3 of the Military Selective Service Act in order to receive financial aid. The words of Section 1113 could not be more clear.[10]

Appellants point to regulations promulgated by the Department of Education in consultation with the Selective Service System as support for interpreting Section 1113 as allowing late registration. *See* 34 C.F.R. Part 668, 48 Fed. Reg. 15578-84 (April 11, 1983). Not only are the regulations irrelevant in this challenge to Section 1113, but they are also inconsistent with the plain meaning of Section 1113 and, as the district court held, are void. J.S. App. B at 33a-34a. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("The rule-making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the

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[10]The intention of the legislature is first of all to be found in the words of the statute, taking them in their natural and ordinary sense. It is fundamental that the plain and ordinary meaning of statutory language controls as words are the means by which legislative will is conveyed to the public. If the words are free from ambiguity, there is neither necessity nor justification for resorting to other means of interpretation. *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also* McCaffrey, F., *Statutory Construction* 38 (1953); Sands, C., 2A *Sutherland Statutory Construction* § 46.01 (1973) [and cases cited therein].

On page 17 of their brief, appellants cite to a *part* of Section 1113 that in their opinion "supports" the proposition that nonregistrants are allowed to register late in order to qualify for financial aid. What appellants conveniently omitted in their quotation were two express references to the registration requirements of and under Section 3. As discussed, *supra*, these requirements include registration within 30 days of a male's eighteenth birthday.

will of Congress *as expressed by the statute.'* ") (Emphasis added).

Appellants' final argument is that Section 1113 should be interpreted to allow for late registration in light of congressional intent. Appellants' Brief at 15, referring to Brief at 5-6. To the contrary, the sponsors of the bill in both the Senate and the House understood quite clearly what Section 3 of the Military Selective Service Act requires. Senator Mattingly stated that, "as long as we have the law [of draft registration], all men *reaching the age of 18* should and must register for it. . . . If a young man decides he will ignore this law, he should not be eligible for financial assistance from the Federal Government." 128 Cong. Rec. S4943 (May 12, 1982) (emphasis added). Representative Solomon describes the registration law as "the law of the land which requires that all men between the ages of 18 and 19 register." 128 Cong. Rec. H4757 (July 28, 1982).[11]

Appellants' distorted view of Section 1113, if adopted, has serious consequences. First, their interpretation requires the conclusion that Congress amended, or partially repealed, Section 3 of the Military Selective Service Act (even though that intention was nowhere expressed). Alternatively, by permitting late registration for the purpose of financial aid eligibility, appellants are actually compelling self-incrimination by requiring delivery of information

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[11]Any argument that Congress intended to permit late registration is undercut by the fact that Congress rejected an amendment by Representative Simon which would have specifically permitted late registrants to receive financial aid. 128 Cong. Rec. H4758-59 (July 28, 1982). As appellants agree, the registration law (Section 3 of the Military Selective Service Act) does not allow one to avoid its penal sanctions by registering late. Appellants' Brief at 17, n.7.

which provides a link in the chain of evidence used to prosecute the nonregistrant."[12] Moreover, if appellants "promise" not to enforce Section 3 against students who apply for financial aid and who are late registrants, appellants would treat such late registrants unequally from nonstudents and late registrants who do not apply for aid, thus creating equal protection problems.

As the district court found, Section 1113 targets the identifiable group of unregistered male students who need financial aid.

B. Section 1113 Inflicts Punishment.

Section 1113 punishes nonregistrants by denying them "any form" of federal financial assistance under Title IV of the Higher Education Act of 1965.[13] In turn,

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[12]Appellants claim that the form for the statement of compliance as recommended by the regulations, 34 C.F.R. § 668.25, 48 Fed. Reg. 15582 (April 11, 1982), does not require applicants to state *when* they registered. (Appellants' Brief at 6). However, from verification procedures mandated by 50 U.S.C. App. § 462(f)(3) and described in 34 C.F.R. § 668.26, including the submittal of the registration Acknowledgement Letter, SSS Form 3A (which contains both the date of birth and the date of registration), and from the financial aid application, the statement of compliance, financial aid records, and other sources readily available to appellants, the fact of an individual's late registration will be revealed. *See* discussion of self-incrimination, *infra*, Section II.

[13]Under Title IV there are six major programs which provide financial assistance to students seeking higher education. These are National Direct Student Loans, the College Work Study Program, Supplemental Educational Opportunity Grants, Pell Grants, State Student Incentive Grants, and Guaranteed Student Loans. Two out of three students at private colleges are receiving some form of financial aid (*see* Chronicle of Higher Education, April 6, 1981 at 14, cols. 1-5), a substantial portion of which comes from federal student loan and other student assistance programs under Title IV. *See* Chronicle of Higher Education, Jan. 25, 1984 at 1, cols. 4, 5 & 16, cols. 3, 4 & 5.

denial of financial aid forecloses educational and career opportunities.[14] There can be no doubt that the loss of such opportunities constitutes an onerous punishment in our society. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982). As the district court concluded, "[c]onsidering the importance of the opportunity to seek a college education in these times, deprivation of that opportunity based on past conduct of the group deemed to be disloyal seems to this court to be punishment." J.S. App. at 15a.

This Court has identified three factors to consider in determining whether a sanction contained in a statute constitutes punishment: (1) whether the sanction is similar to traditional forms of punishment; (2) whether the law, viewed in light of its restraints, can be said to further nonpunitive purposes; and (3) whether there was Congressional intent to punish. *Nixon v. Administrator of General Services*, 433 U.S. 425, 473-78 (1977). Applying these factors to Section 1113 leads inescapably to the conclusion that the sanction imposed by Section 1113 constitutes punishment within the meaning of the Bill of Attainder Clause.

The first factor involves a comparison of the sanction at issue with historical punishments. While the loss of educational assistance with the concomitant loss of educational and career opportunities is distinguishable from

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[14]Each appellee has stated that he has received financial aid under Title IV and that he will be unable to complete his education at his college or university without financial assistance. Furthermore, each has stated that his career plans require that he complete his college education. Appellees Doe, Roe, and Poe have signed affidavits to this effect. Appellees Boe, Coe and Foe have signed letters to this effect, and their counsel has verified that information in an affidavit as well. *See* J.A. at 11-12, 16, 24-25, and 29.

such historical punishments as imprisonment and fines, the Section 1113 sanction is similar to sanctions which this Court has historically struck down as punitive under bill of attainder analysis. For example, in *Cummings* this Court found that denying a class of persons the opportunity to pursue certain professions constituted punishment. Similarly, in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867), this Court determined that denying a certain class of persons the opportunity to practice law in federal courts constituted punishment. In *United States v. Lovett*, 328 U.S. 303 (1946), this Court concluded that barring certain people from federal employment constituted punishment. Given the above three cases in which foreclosures of vocational opportunities were determined to be punitive, Section 1113's foreclosure of a broad range of educational and, hence, vocational opportunities is *a fortiori* punishment.

As this Court recognized in *Cummings*, "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment. . . ." 71 U.S. (4 Wall.) at 320. Moreover, in *Nixon*, this Court recognized that a rigid interpretation of punishment grounded on historical precedent is not to be adopted because it would preclude "the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." 433 U.S. at 475.

Section 1113's sanction of cutting off educational opportunities is just the sort of newly-fashioned burden envisaged in *Nixon*. Post-secondary vocational training and college degrees have become the *sine qua non* of advance-

ment in today's society. To disable a citizen from pursuing such training is to inflict a severe penalty.[18]

The second factor examines whether Section 1113 is penal or regulatory. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), this Court enunciated some considerations to be used in determining whether a sanction is penal:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be con-

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[18]Appellants argue that under *Fleming v. Nestor*, 363 U.S. 603 (1960), Section 1113's deprivation of financial aid is a "mere denial of a noncontractual government benefit." Appellants' Brief at 21. Appellants' reliance on *Fleming* is misplaced. That case, which upheld a provision of the Social Security Act that permitted termination of benefits to an alien who is deported on certain grounds, turned on the oft-noted fact that the benefits at issue were "noncontractual". *Id.* at 610, 611, 617. The Court expressly refused to recognize Social Security benefits as "accrued property rights" which merit constitutional protection. *Id.* at 610. Ten years later, however, this Court rejected the notion that welfare benefits were noncontractual privileges free from constitutional protections. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). And in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), disability benefits under the Social Security Act were held to be a "property" interest protected by the Constitution. Thus, the underpinnings of *Fleming* have been removed.

Moreover, in *Fleming*, no deprivation could take place until an alien had been subjected to deportation proceedings which complied with procedural due process of law and until an alien had an opportunity to seek judicial review of the deportation order. Under Section 1113, deprivation follows automatically from a failure to file a statement of compliance.

> nected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Under the *Kennedy* criteria, Section 1113 is penal. By denying needy and intelligent students access to education, it acts as both a disability and a restraint. Restraints similar to that of Section 1113 have historically been interpreted by this Court to constitute punishment. *See Cummings, Garland,* and *Lovett.* By imposing its sanction before any hearing, Section 1113 assumes that nonregistrants possess guilty intent. Section 1113 also promotes the traditional aims of punishment by imposing retribution against nonregistrants and by deterring future nonregistration, and it applies to behavior which is already a crime. *See* 50 U.S.C. App. § 462 (1981). In addition, Section 1113 has no educational purpose to which it may rationally be connected. Finally, by applying to those who have inadvertently failed to register as well as those who have intentionally failed to register, it is excessively broad.

Appellants contend that Section 1113 has regulatory goals, one of which is to encourage registration. "Encouragement" is a devious euphemism for the sanction of Section 1113. "Encouragement" connotes positive reinforcement and rewards. By contrast, Section 1113 mandates a denial of all forms of federal financial assistance and forecloses educational and vocational opportunities. In that manner, Section 1113 serves two goals of punishment—retribution and deterrence. *See Brown,* 381 U.S. at 458. As the district court concluded, under the appellants' strained interpretation of Section 1113, "every

'punishment' could be renamed an 'encouragement' thereby escaping the Constitution's proscription on bills of attainder." J.S. App. at 16a.

Appellants also suggest that Section 1113 furthers the allegedly nonpunitive goal of achieving "a fair allocation of increasingly scarce federal aid dollars."[16] A truly regulatory statute would reflect an allocation of resources based on a rational consideration of objective criteria relevant to the subject matter, here higher education and financial need. Merely because a statute apportions resources in some manner does not make it regulatory. Otherwise, Congress could deprive any disfavored group of an almost endless variety of grants, benefits, and government largesse without violating the Bill of Attainder Clause.[17]

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[16]Appellants' Brief at 23. Appellants' "fair allocation" argument reflects a misunderstanding of the thrust of appellees' objection to Section 1113. Appellees do not argue that Congress is without power to bar persons found guilty after judicial trial of violating the Selective Service Act from access to student loan funds. While such a punishment inflicted after judicial trial would be harsh and perhaps shortsighted, it may well rest within the power of Congress. Rather, appellees object to Section 1113 because it inflicts such a punishment without the "formality" of a finding of guilt after judicial trial.

[17]Appellants cite *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as supporting the claim that there exists a broad right to condition the receipt of federal monies in any way. *Fullilove* neither addressed nor supported the imposition of conditions in violation of the Bill of Attainder Clause. In *Fullilove*, the Court upheld an administrative requirement, which could be waived, that at least 10 percent of federal funds granted for local public works projects be used to procure services from "minority business enterprises." This "condition" was upheld because it furthered Congress' policy of remedying past racial discrimination. Interestingly, the Court stated at 490:

> The Congress must proceed only with programs narrowly tailored to achieve its objectives . . . and, when such a program comes under judicial review, *courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the pro-*

Appellants argue that the fact that Section 1113 applies to conduct which is already a crime, standing alone, does not prove that the real purpose behind Section 1113 is punitive. Appellants' Brief at 25. However, as discussed herein, that fact does not stand alone. Rather, it is just one of a long list of telling and probative indications that Section 1113 has a punitive function.

The third factor in *Nixon* scrutinizes the motivation of the legislators. The inquiry is "whether the legislative record evinces a congressional intent to punish." 433 U.S. at 478. That Congress had precisely a punitive intent is demonstrated by the fact that Section 1113 was not drafted as a part of an education act, but rather is an amendment to, and is codified within, Section 12 of the Selective Service Act entitled, "Offenses and Penalties." Surely, when Congress itself calls a statute a "penalty," further inquiry is unnecessary. *See* n. 10, *supra* at 17.

Furthermore, the Congressional record is rife with statements evincing an intention to punish. For instance, its sponsor declared, "I intend to offer the same amendment *until every young man is deprived of Federal assistance unless he has obeyed the law...* ." Comments of Representative Solomon, 128 Cong. Rec. H4757 (July 28, 1982) (emphasis added). His intent is explicit: he wanted to punish all nonregistrants by depriving them of federal aid of any kind. Similarly, Representative Montgomery, cosponsor of Section 1113, stated, "[i]t is a felony, they have

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gram will function within constitutional limitations. (Emphasis added.)

Here, Congress' attempt to enforce a criminal statute, without the usual constitutional guarantees associated with arrest and trial, through the vehicle of disbursement of federal financial aid to college students, is not within the bounds of constitutional limitations.

violated the law, and they are not entitled to these educational benefits." *Id.*

The opponents of Section 1113 clearly recognized the punitive motivation reflected in the above comments made by supporters of the legislation. For example, Representative Edgar stated, "[t]his amendment has the obvious primary objective of increasing the number of men registered. . . . However, it has a secondary, and more subtle, objective, which is to punish those individuals who do not register. 128 Cong. Rec. H4760 (July 28, 1982). Representative Goldwater added that a nonregistrant "not only stands a chance of going to jail, but he also stands a chance of not receiving financial assistance for education, which is just as harsh a penalty in terms of the boy's future." 128 Cong. Rec. H4761 (July 28, 1982).[18]

Senator Hayakawa, sponsor of the Senate bill, captured the pervading animus of Section 1113 when he said, "Shall we allow nonregistrants to ask this country to provide for their educational needs when they have no intention of fulfilling their national obligation? The answer is clearly, no. . . . This [statute] is an important signal to every American that *this Congress will not tolerate any willful, blatant rejection of the responsibilities* which come with living in a free nation." 128 Cong. Rec. S4944 (May 12, 1982) (emphasis added).

The sanction of Section 1113, the denial of federal financial aid, is historically punitive; functions in a punitive manner; and was intended to be punitive. Hence, Section

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[18] *See also* remarks of Representative Moffett, 128 Cong. Rec. H4758 (July 28, 1982) ("additional penalty"); remarks of Representative Patterson, 128 Cong. Rec. H4760 (July 28, 1982) ("What is the intended punishment for those who do not need or require student aid assistance?").

1113 inflicts punishment within the meaning of the Bill of Attainder Clause.

C. Section 1113 Legislatively Determines Guilt and Inflicts Punishment Without Benefit of the Protections of a Judicial Trial.

Section 1113, by automatically imposing a sanction without judicial intervention, falls precisely within the Bill of Attainder prohibition. In *Lovett* a provision denying specific federal employees their jobs because they were believed to be "subversive" was found to inflict punishment without the safeguard of judicial trial, and was struck down as an unlawful bill of attainder. This Court noted that the Bill of Attainder Clause was included in the Constitution in order "to safeguard the people of this country from punishment without trial by duly constituted courts." 328 U.S. at 317.

Appellants make much of the fact that there is a provision in Section 1113 for a hearing if requested. On the basis of that, they argue that the judicial process has not been supplanted. This argument betrays a misunderstanding of both the judicial process and bill of attainder law.

The hearing permitted by Section 1113 takes place *only* when an applicant for aid asserts that "he is in compliance with the registration requirement" and yet has been denied aid on the basis of nonregistration. 34 C.F.R. § 668.27 (c)(2). At the hearing, the applicant bears the burden of proof, and the sole inquiry is whether or not he registered. 34 C.F.R. § 668.27(c)(3). In other words, appellants'

asserted "judicial process" is not available to all who are punished by Section 1113.[19] Indeed, all of the six appellees have been punished, yet none has had a hearing which comports with due process.[20]

The fallacy of appellants' argument that the hearing provided for in Section 1113 is adequate to withstand scrutiny under bill of attainder analysis is best seen by considering whether a provision for such a hearing would have saved the statutes struck down in *Cummings*, *Garland*, and *Lovett*. Had Section 1113's scheme been written into the legislative act in *Cummings*, a hearing would have

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[19]To those few for whom an administrative hearing is available (those who have signed the statement of compliance and whose veracity or registration status is challenged), the hearing, with the burden on the disabled party, provides none of the protections of a judicial trial and is clearly inappropriate when the real issue being adjudicated is the crime of failing to register. Assuming, *arguendo*, that an administrative tribunal could properly decide the issue of a failure to register without violating the Fifth and Sixth Amendments, an opportunity to raise defenses must be permitted in order to adjudicate the issue fully. However, the regulations specifically provide that the hearing officer "shall *not* consider challenges based on constitutional or other grounds to the requirements that a student state and verify . . . compliance with registration requirements, or to those registration requirements themselves." 34 C.F.R. § 668.27(c)(3). (Emphasis added.)

[20]In *Lovett* the Court described the due process rights to which every accused is entitled:

> An accused in a court must be tried by an impartial jury, has a right to be represented by counsel, must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself. . . .

328 U.S. at 317-18. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (striking down a statute which imposed an automatic forfeiture of citizenship as being violative of due process and fair trial rights of Fifth and Sixth Amendments).

been granted not to ex-Confederates who refused to take the oath and thereby forewent professional certification. Rather, it would have been available only to those few who took the oath and whose veracity was subsequently challenged. At the hearing, the person who had been challenged would have the burden of demonstrating that he had not served the Confederate cause. Hanging in the balance would be his ability to pursue his chosen vocation. Such a scheme would not have changed the outcome in *Cummings* and should not change the conclusion in this case that Section 1113 punishes a group of people without the protections of the judicial process.

Section 1113, by inflicting punishment on an identifiable group of people without affording them the protections of a trial, constitutes a bill of attainder.

II. SECTION 1113 VIOLATES THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself . . .."[21] The policies underlying the Amendment

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[21]This important constitutional protection is to be interpreted broadly, in keeping with the Amendment's spirit. *Ullmann v. United States*, 350 U.S. 422, 426 (1956); *Quinn v. United States*, 349 U.S. 155, 162 (1955). While the Amendment expressly applies to criminal cases, it is clear that it "can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*" *In Re Gault*, 387 U.S. 1, 47-48 (1967) (emphasis in original), citing *Murphy v. Waterfront Comm'n*, 378 U.S. at 94 (White J., concurring). In other words, "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Gault* at 49.

have been expressed as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitional system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted).

The privilege extends not only to the information that would in itself be incriminating, but also to answers that would furnish a link in a chain of evidence to prosecute:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the

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(Footnote 21 continued)

The term "witness" in the Amendment is used in a broad sense to include "one who, at the time the disclosures are sought from him, is not a defendant in a criminal proceeding." *Garner v. United States*, 424 U.S. 648, 652 n. 7, 656 (1976) ("the information revealed in the preparation and filing of an income tax return is, for the purpose of Fifth Amendment analysis, the testimony of the witness").

> question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Hoffman v. United States, 341 U.S. 479, 486-87 (1951). *See also Maness v. Meyers*, 419 U.S. 449, 461 (1975). Thus, the privilege protects any disclosures that a person may reasonably apprehend could be used in a criminal prosecution or could lead to other evidence that might be used to prosecute. *Murphy*, 378 U.S. at 94 (White, J., concurring).

Section 1113 is a penal statute requiring certification by each applicant for financial aid that he has complied with Section 3 of the Military Selective Service Act.[11] Failure to register under the Act is a criminal offense. 50 U.S.C. App. § 462 (1981). Similarly, a student who provides a false statement of compliance is subject to prosecution for perjury. 20 U.S.C. § 1097 (1982).

Appellees contend, and the district court found, that Section 1113 violates the Fifth Amendment in two ways. First, the statute penalizes those who assert the privilege by denying them access to Title IV funds to pursue their educations, impermissibly burdening the exercise of the privilege. Second, the statute's scheme of operation serves to incriminate those who choose to assert the privilege, and also those who register late to obtain financial aid, in both cases putting the Selective Service System on notice that the student is in violation of the law.

The trilemma facing nonregistrant students is no less cruel and impermissible in the present case than it was in *Murphy*. Here students must (a) accuse themselves as non-

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[11] See discussion, *supra* at 22-23.

registrants by claiming the privilege, (b) commit perjury, or (c) forego financial aid, and thus higher education and the pursuit of their chosen careers."[28] To claim, as the government does, that students need not apply for federal educational assistance begs the question. See n. 14, *supra* at 20.

A. Section 1113 Compels Self-Incrimination.

Appellants' discussion of the Fifth Amendment focuses exclusively on whether or not self-incrimination is "compelled." They argue, first, that appellees need not apply for federal aid (and thus need not provide incriminating information), and second, that under Section 1113 nonregistrants are ineligible for federal aid and thus it is "inconceivable that one is compelled in any way to apply for benefits for which he is ineligible." Appellants' Brief at 30-32.

Whether compulsion exists is determined by focusing on the consequences of invoking the privilege, typically by

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[28]Section 1113, by requiring needy students to implicate themselves in a criminal act, commit perjury or leave school is a classic "test oath" in flagrant violation of the core of the Fifth Amendment. *See* Levy, *Origins of the Fifth Amendment* 330-31 (1965). Instead of a process which establishes guilt by investigation and adjudication, the test oath permits the State to punish all who cannot—or will not—attest to their innocence, thus reversing the presumption of innocence. If the government is permitted to target needy students and subject them to a test oath as a means of enforcing the Selective Service Act, no principled limitation will exist to the spread of the test oath device into other areas of criminal law enforcement. If student loans may be conditioned on the satisfaction of a test oath involving an unrelated penal statute, so may a virtually limitless array of programs, ranging from drivers' licenses to health benefits to telephone service. Fortunately, the intersection of the privilege against self-incrimination and the prohibition on Bills of Attainder precludes our society from drifting toward law enforcement by test oath.

examining whether a penalty or sanction attaches. The Fifth Amendment guarantees against federal infringement "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Spevack v. Klein*, 385 U.S. 511, 514 (1966), citing *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Court defined "penalty" as follows:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U.S. 609, the imposition of *any sanction* which makes assertion of the Fifth Amendment privilege "costly."

385 U.S. at 515 (emphasis added).

In *Spevack*, the Court held that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege." *Id.* at 516. It expressly recognized that such threats are "as powerful an instrument of compulsion as the 'use of legal process' . . .." *Id.*, citing *United States v. White*, 322 U.S. 694, 698 (1944). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 806-07 (1977). Thus, contrary to appellants' suggestion, legal process is not the only means of compulsion. The denial of federal financial aid and the termination of higher education and one's chosen career for not providing incriminating information is a penalty which makes the assertion of the privilege "costly" indeed.

On the record before the Court, it is undisputed that appellees have stated unequivocally that without federal educational assistance they will be unable to continue to attend college. J.A. at 11-12, 16, 24-25 and 29. As-

suming, *arguendo*, that each could find an alternative source of financing his education, the ability to do so does not cure Section 1113. This Court rejected a government argument that architects who claimed their Fifth Amendment privilege, and who were consequently barred from public contracting for five years, could find employment in the private sector and would not therefore suffer a penalty sufficient to compel their testimony:

> "[T]he plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights." We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.
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> * * *
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> A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage.

Lefkowitz v. Turley, 414 U.S. 70, 83-84 (1973) (citation omitted).

The present situation fits squarely within the analysis of *Marchetti v. United States*, 390 U.S. 39 (1968), which held that a wagering tax and registration statute violated the Fifth Amendment. Although the Court recognized that the statute assisted in the enforcement of state anti-gambling statutes, it overruled two of its prior decisions holding that the privilege against self-incrimination may not be appropriately asserted by gamblers:

> The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself.

> The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation."

Id. at 51-52 (citations omitted). The relevant question here is not whether appellees choose, on the one hand, to register or, on the other, to apply for financial aid, but whether, having failed to register and finding it necessary to apply for financial aid, they may be forced to choose between incriminating themselves or forfeiting financial aid.

The fact that appellees initially approached the government in applying for financial aid has no bearing on their right to avail themselves of their Fifth Amendment privilege. In this regard, those who fail to register but "choose" to apply for financial aid are no different from those who choose to work for the state, apply for government contracts, or hold office in political parties. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) and *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (police officers cannot be discharged for failure to relinquish the protection of the

privilege against self-incrimination); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 284 (1968) (city employees may not be discharged for invoking and refusing to waive their right against self-incrimination); *Lefkowitz v. Turley*, 414 U.S. at 83 (independent contractor may not be disqualified from further transactions with the state for refusing to waive immunity); *Lefkowitz v. Cunningham*, 431 U.S. at 805-06 (unsalaried officer of political party cannot be removed from office and disqualified from holding other public office for refusing to waive immunity).

If the tortured arguments of appellants were the law, no Fifth Amendment violations would have been found in any of these cases because the police officer and refuse haulers in *Garrity* and *Sanitation Men* could have found other employment, the architects in *Turley* could have worked in the private sector and the political officer in *Cunningham* could have resigned his post. Similarly, the bookmakers and gamblers in *Marchetti* and *Grosso v. United States*, 390 U.S. 62 (1968) could have chosen other occupations and the Communist Party members in *Albertson v. SACB*, 382 U.S. 70 (1965) could have quit the organization. However, this Court held that all of these people were "compelled" to incriminate themselves because the so-called "choice" was too high a price to pay.

For example, in *Garrity*, 385 U.S. at 497-98, the Court held that the "option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." It noted that "where the choice is 'between the rock and the whirlpool' duress is inherent in deciding to 'waive' one or the other." The Court, citing *Union Pac. R.R. Co. v. Pub. Service*

Comm., 248 U.S. 67, 70 (1918), recognized that the existence of a choice does not negate compulsion:

> It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.

385 U.S. at 498.

In all of the above cases the Court found the threatened loss of employment, contracts, reputation or political office to be inherently coercive, and thus to provide the necessary compulsion.[24] Here, appellees have no option of receiving federal financial assistance in another way. To receive the assistance they need to attend college under any of the programs funded by Title IV, they must file a statement of compliance. Students who cannot complete their educations without such assistance have no more "choice" whether to file than did the gambler who could "choose" not to gamble or the architect who could "choose" to practice in the private sector. Certainly, the availability of financial aid for higher education must be judged to be of at least the same economic significance as the ability to qualify for government contracts in *Turley*

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[24]In *Minnesota v. Murphy*, No. 82-827 (Feb. 22, 1984), this Court reaffirmed the rationale of these "punishment" cases. In *Murphy* a probationer argued that his privilege against self-incrimination had been burdened because an assertion of the privilege while talking with his probation officer would have led to revocation of his probation. This Court stated that "if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation. . . ." Slip op. at 14. Under Section 1113 invocation of the privilege leads to the loss of financial aid, thus creating "the classic penalty situation."

or the holding of an unsalaried political party office in *Cunningham*.

Finally, even a compelling governmental interest cannot justify a statute which violates the privilege against self-incrimination. While acknowledging that the state had "a strong, legitimate interest" in maintaining the integrity of its civil service and of its transactions with independent contractors furnishing a wide range of goods and services, this Court in *Lefkowitz v. Turley* observed that "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." 414 U.S. at 78.[25]

In short, legislative objectives cannot be pursued by means which unnecessarily interfere with the exercise of basic constitutional rights. *United States v. Jackson*, 390 U.S. 570, 582 (1968).

B. The Framework of Section 1113 Provides for Self-Incrimination.

Section 1113 prohibits any person "who is required under Section 3 [of the Military Selective Service Act] to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section" from receiving "any form of assistance or benefit provided under Title IV of the

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[25]The Court in *Turley* then enumerated cases in which claims of overriding governmental interests were rejected. *See, e.g., McCarthy v. Arndstein*, 266 U.S. 34 (1924) (strong public interest in marshaling and distributing assets of bankrupts); *Brown v. Walker*, 161 U.S. 591, 610 (1896) (that enforcement of the transportation laws "would become impossible"); *Hale v. Henkel*, 201 U.S. 43 (1906) (enforcement of the antitrust laws against private corporations); *Garrity, supra*, and *Gardner v. Broderick*, 392 U.S. 273 (1968) (investigation of police corruption). *See also* n. 17, *supra* at 24.

Higher Education Act of 1965." 50 U.S.C. App. § 462 (f)(1). Presidential Proclamation No. 4771 issued pursuant to Section 3 requires certain male citizens to present themselves for registration according to a schedule based on their calendar year of birth, or within 30 days of their eighteenth birthdays.

Appellants argue, and the regulations promulgated by the Secretary of Education assume, that late registration for the draft is not a disqualification for educational assistance under Title IV.[28] However, if one of the appellees were to register now so that he could submit a statement of compliance acceptable to appellants to obtain financial aid, he would still be in violation of Section 3 of the Selective Service Act. He would not have submitted to registration "in accordance with any proclamation" issued under Section 3 because he registered late. Thus, he would be subject to criminal penalties under the Act and would have furnished information which may be used to prosecute him.

In attempting to remove Section 1113 from the scope of the bill of attainder prohibition, appellants concede that this section operates to induce, if not to coerce, financial aid applicants to waive their privilege against self-incrimination:

> Section 1113 assigns no blame to those who have failed to register. On the contrary, at least for purposes of Title IV aid, *it excuses even those who have willfully defied the law by allowing them a second*

[28]Needless to say, the Secretary of Education may not render an unconstitutional statute constitutional by declaring, through regulation or otherwise, his present intention not to enforce the statute. *See Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

> *chance to comply. The question of blame and punishment for continued nonregistration is reserved for the courts in the context of a criminal prosecution under 50 U.S.C. App. (& Supp. V) 462.*

J.S. at 17 (emphasis added). Again in Appellants' Brief at 17, n. 7, while claiming that "failure to register within the time fixed by Proclamation No. 4771 does not disqualify the registrant for Title IV aid," they admit that "it is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462." The government thus is explicit in reserving the right to utilize information obtained from financial aid applicants as a basis of a criminal prosecution for violation of the Selective Service Act, either for nonregistration or for late registration.

In addition, Section 1113 requires the Secretary of Education, in agreement with the Director of the Selective Service System, to prescribe methods for verifying statements of compliance and that these "methods may include requiring institutions of higher learning to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance." 50 U.S.C. App. § 462 (f) (3). Regulations published by the Secretary of Education specify that verification of registration compliance for academic years beginning on or after July 1, 1985 may be by the student's registration Acknowledgement Letter (SSS Form 3A or 3A-s) which contains both the registrant's date of birth and his date of registration. 34 C.F.R. § 668.26(d) (1)." The location of Section 1113, not as part of any education act but as an amendment to the section of the Selective Service Act which imposes criminal penalties, 50 U.S.C.

"*See* n. 12, *supra* at 19.

App. § 462, when combined with verification procedures outlined in the law and the regulations, strongly implies the consequences of an applicant's assertion of his Fifth Amendment rights. The Selective Service System will be put on notice that the applicant is in violation of the law.

As recognized by the district court, "students who need financial assistance are forced to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status." J.S. App. at 28a. Here, as in *Albertson v. SACB*, 382 U.S. 70 (1965), the financial aid process requires the furnishing of information which could be used to prosecute the registrant for violation of a federal criminal statute. As specifically found by the district court, "[t]he information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant." J.S. App. at 23a. On the other hand, if the nonregistrant student availed himself of his Fifth Amendment right to remain silent, he would forego educational benefits, and thus, educational opportunities and the pursuit of his chosen career.[28]

[28]Even students who remain silent (*i.e.*, do not provide a statement of compliance, do not plead a valid defense, or do not apply for financial aid) may be incriminating themselves for failure to register on time. The fact that a student did not apply for financial aid after Section 1113 was enacted, but applied and received aid in prior years, may be a link used by enforcement officials searching for violations. Incomplete applications may also be a link. A student may reasonably believe that the Justice Department will use the fact that he did not apply for financial aid or submit a statement of compliance as evidence of knowing or intentional noncompliance in a subsequent trial. Therefore, students who remain silent, as well as students who mistakenly claim compliance and students who wish to contest denial of financial aid, incriminate themselves under the provisions of Section 1113. *See* J.S. App. at 25a.

Appellants may not use the threat of withholding educational benefits from one who needs them to coerce and compel the individual to forfeit his right against self-incrimination.

III. SECTION 1113 VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT IN THAT IT DISCRIMINATES ON THE BASIS OF WEALTH.[29]

Although the district court did not reach the issue, appellees have urged throughout the pendancy of this case that Section 1113 violates the Fifth Amendment right to equal protection under the law because it discriminates on the basis of wealth.

The Section 1113 requirement of certifying compliance

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[29]Section 1113 may also impinge upon academic freedom guaranteed by the First Amendment which includes the right to selection of the student population by both the institution and the student. *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body"). Section 1113 limits the pool of available students from which colleges and universities may select their student bodies on a basis unrelated to need, academic competence or other educationally relevant criteria. Admittedly, colleges and universities do adhere to certain generally applicable federal laws that burden their power, for example, civil rights laws which have a connection with the mission of academic institutions to provide educational opportunities. *Cf. Bob Jones University v. United States*, —U.S.—, 1035 S.Ct. 2017, 2035 n. 29 (1983). In contrast, Section 1113 has no connection with the purposes of academic institutions and represents instead an unconstitutional attempt to use only educational institutions to enforce an unrelated federal criminal statute inconsistent with their protected status under the First Amendment. Furthermore, as regulations require educational institutions to play primary and substantial roles in the process of enforcing Section 1113, 34 C.F.R. Part 668, that section will serve to chill the relationship between students and their academic institutions and the environment in which learning is pursued.

with draft registration obligations as a prerequisite to obtaining federal assistance for post-secondary education establishes an unnecessary burden and penalty on those who cannot afford to attend college without such assistance. The very purpose of the financial aid provisions of the Higher Education Act, 20 U.S.C. § 1070 *et seq.*, is to encourage attendance at colleges, universities and vocational schools by low and middle income students for the ultimate benefit of society. This Court also has recognized the critical role of education and its importance to society. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

During the Senate debate on the bill which resulted in enactment of Section 1113, Senator Durenberger recognized that Congress "would be punishing [the] middle class . . . more than we punish those who are wealthy enough to pay their own way through college, and more than those who do not attend college at all." 128 Cong. Rec. S4945 (May 12, 1982). *See also* 128 Cong. Rec. H4765 (July 28, 1982). Even the bill's sponsor in the House, Representative Solomon, recognized that "maybe we are discriminating against the poor." 128 Cong. Rec. H4767 (July 28, 1982).

While this Court has been reluctant to enunciate a specific standard of review for discrimination based on wealth equivalent to that applied to discrimination based on race, religion, or alienage (although wealth discrimination may have a strong adverse impact on such minority groups), a distinction based on wealth will be declared unconstitutional unless it is related to a rational legislative purpose and is not "invidious." *Dandridge v. Williams*, 397 U.S. 471, 483 (1970). This Court has "treated as *presumptively invidious* those classifications that . . . impinge upon the exercise of a 'fundamental right'." *Plyler*,

457 U.S. at 216-17 (emphasis added). While the Court has not elevated education to the status of "fundamental right," it has described education as a matter of "supreme importance."[30] In addition, it has acknowledged that "education has a fundamental role in maintaining the fabric of our society" and "a pivotal role . . . in sustaining our political and cultural heritage." *Id.* at 221. Thus, any action which impinges upon access to education without a rational legislative purpose should be deemed violative of the equal protection guarantee.[31]

There is no rational relationship between the enforcement of draft registration requirements of the Military

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[30]Recently, in *Bearden v. Georgia*, — U.S. —, 103 S. Ct. 2064, 2072 (1983), this Court struck down a law that unfairly burdened a "significant interest" without requiring the interest to be a "fundamental right," because there were alternative means to further the legislative purpose.

[31]In *Vlandis v. Kline*, 412 U.S. 441, 459 (1973), which concerned the issue of resident and non-resident college tuition, Justice White, in a concurring opinion, suggested the appropriate standard of review where there is discrimination in higher education.

> [I]t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.
>
> *Here, it is enough for me that the interest involved is that of obtaining a higher education.* . . . It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizzare pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.

(Emphasis added.) Involved here, as in *Vlandis*, is the interest in obtaining a higher education which similarly outweighs the appellants' interest, if any, in maintaining Section 1113.

Selective Service Act and the purposes of the Higher Education Act. Section 1113 significantly burdens access of less wealthy nonregistrants to education and therefore amounts to invidious discrimination. Appellants argue that the purpose of Section 1113 is the "fair" allocation of scarce federal aid dollars. However, "a concern for the preservation of resources standing alone [cannot] justify [this] classification . . . ." *Id.* at 227.

Appellants already have the authority and the responsibility to prosecute nonregistrants. 50 U.S.C. App. § 462. Section 1113, adding a new provision to the "Offenses and Penalties" section of the Military Selective Service Act, creates a significant burden upon a class of students based upon lack of wealth which is both unnecessary and invidious.[22]

In addition to discriminating on the basis of wealth in access to higher education, Section 1113 unleashes a dual system of Selective Service law enforcement keyed to wealth. Wealthy young men are immune from its reach and are subject solely to the traditional criminal process. Economically vulnerable young men, however, are subject to both the criminal process and to the economic compulsion imposed by a loss of financial aid. While the Court has been

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[22]The operation of Section 1113 actually adds to wealth-based inequities in the Selective Service System which prior Administrations and Congress have historically sought to mitigate. *See* "In Pursuit of Equity: Who Serves When Not All Serve?", *Report of the National Advisory Commission on Selective Service* ("The Marshall Report") 37-51 (1967); Legislative History of Section 101(a) (20) of the Military Selective Service Act, Pub. L. No. 92-129 [codified at 50 U.S.C. App. § 454(i)], 117 Cong. Rec. S12280-81 (June 14, 1971); Comments of Representative Hartnett on Section 1113, 128 Cong. Rec. H4764 (July 28, 1982). For further historical perspective, *see* Anderson, *The Military Draft* (Hoover Press, 1982).

cautious in reviewing discriminations based on wealth, it has systematically refused to countenance dual criminal law enforcement systems keyed to wealth.[23] It would make a mockery of the concept of equality before the law to require scrupulous protection of the poor during the *adjudicative* process, while upholding devices like Section 1113 which single out the poor for special law enforcement attention without the pretense of a judicial trial.

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[23] *E.g.*, right to counsel, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); access to transcripts, *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); filing fees, *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); sentencing, *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (period of imprisonment which varies on the basis of wealth constitutes "invidious discrimination").

CONCLUSION

For the reasons stated herein, the decision of the United States District Court for the District of Minnesota should be affirmed.

Respectfully submitted,

William J. Keppel, Counsel of Record
James E. Dorsey III
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2745
Counsel through the Minnesota Civil Liberties Union and the American Civil Liberties Union for Appellees John Doe, Richard Roe, and Paul Poe

E. Gail Suchman
Minnesota Public Interest Research Group
2412 University Avenue Southeast
Minneapolis, Minnesota 55414
(612) 376-7554
Counsel for Appellees Bradley Boe, Carl Coe, and Frank Foe

Of Counsel:

Amy M. Silberberg
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414
(612) 378-2436
Charles S. Sims
Burt Neuborne
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

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No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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No. 83-276

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

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BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE APPELLANTS

Appellees argue that Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748, is a bill of attainder because it meets all of the requirements identified in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). Every aspect of this argument depends on the erroneous assumption that Section 1113 denies education benefits to those who register more than 30 days after their eighteenth birthday. Appellees also argue that Section 1113 violates the Fifth Amendment because it actually incriminates late registrants, and forces nonregistrants "to choose between incriminating themselves or forfeiting financial aid" (Br. 35). This argument

ignores the obvious fact that nonregistrants are ineligible for financial aid, and incorrectly assumes that the financial aid application process requires a registered applicant to disclose the date when he registered. Finally, appellants contend that Section 1113 violates the equal protection guarantee of the Fifth Amendment because it discriminates on the basis of wealth. This contention is frivolous.

1. Appellees argue that Section 1113 is a bill of attainder because it legislatively determines the guilt of a specific group (Br. 11-19), it inflicts punishment (*id.* at 19-27), and it dispenses with the protections of a judicial trial (*id.* at 27-29). Among other defects, each of these arguments is wholly dependent on the erroneous assumption that Section 1113 denies education benefits to those who register more than 30 days after their eighteenth birthday (Br. 15-18).

a. We showed at length in our opening brief that appellees are mistaken on the preliminary question of statutory construction (Br. 15-18, 25-28). We begin here with a few comments on the proper approach to that question.

In *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), this Court held that a direct appeal would not lie under 28 U.S.C. 1252 from a proceeding in which a federal statute was declared unconstitutional, but in which the government challenged only the district court's remedy. A unanimous Court found that "[u]nder the literal language [of the statute], a party not contesting the constitutional holding would seem to be required to proceed directly to this Court" (slip op. 8). But "the sense of the statute and the literal language [were] at loggerheads" (*ibid.*). Because a literal construction "would undermine the effectiveness of the [statute]" (*id.* at 14), and because both the structure and the legislative history of the provision pointed toward a more sensible interpretation (*id.* at 9-14 & n. 14), the Court concluded that it was proper to go beyond " 'the surface literal

meaning' " of Section 1252 to what was obviously intended by Congress (slip op. 8).

Here it is by no means clear that even "the surface literal meaning" of Section 1113 supports appellees' illogical interpretation (see Appellants' Br. 15, 17), and the structure (*id.* at 17-18), history (*id.* at 25-28),[1] and purpose (*ibid.*) clearly point in the opposite direction. It is of considerable additional significance that here—unlike in *Edwards*—the constitutionality of a statute may depend upon the issue of interpretation.[2] And it is a principle as old as "Mr. Chief Justice Marshall's admonition in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), * * * that an Act of Congress

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[1]Appellees fail to adduce any legislative history supporting their conclusion that Section 1113 denies aid to late registrants. They do note that Representative Simon's amendment (which allowed aid to late registrants) was defeated (Br. 18 n.11). But as Representative Stratton pointed out, the Simon amendment differed from the Solomon amendment in only one respect: it permitted an applicant for aid to "submit a statement that such person refuses to submit to such registration for religious or moral reasons." 128 Cong. Rec. H4758 (daily ed. July 28, 1982). It was that difference that was responsible for the defeat of the Simon amendment (*id.* at H4758-H4763, H4770-H4772).

[2]That is certainly true so far as appellees are concerned, since their bill of attainder argument fails, and with it their self-incrimination argument (Appellants' Br. 31-32 & n.16), unless the Court construes Section 1113 as they urge, to preclude the award of Title IV benefits to late registrants.

We, on the other hand, would argue that Section 1113 is constitutional even if it denies financial aid to late registrants. For even then the law's chief effect would be to provide an incentive to registration for young men turning 18 in the future, not to deny aid to an already fixed class of persons who have failed to register in the past. Moreover, it would still be true that the mere "denial of a noncontractual governmental benefit" to those who have already failed to register on time would not be punishment in the required sense. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960). And a law must satisfy all three of the requirements identified in *Nixon* v. *Administrator of General Services*, 433 U.S. at 468—specificity in application, infliction of punishment, and denial of judicial process—in order to qualify as a bill of attainder.

ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981).

This case is unlike *Edwards* in another way that also makes rejection of appellees' asserted literal construction of the statute even more appropriate. Section 1113 directs that "[t]he Secretary of Education, in consultation with the Director [of Selective Service], shall issue regulations to implement the requirements of this subsection." 96 Stat. 748 (§ 12(f)(4)). Such regulations, representing the combined views of the two agencies directly concerned with the legislation, were promulgated promptly after passage of the law. 48 Fed. Reg. 15578 (1983) (now codified at 34 C.F.R. 668.23 *et seq.*). Those regulations, as the district court recognized (J.S. App. 33a-34a), permit late registrants to receive aid. 34 C.F.R. 668.27(b)(1). "It is well settled that [they] * * * have the force of law so long as they are 'reasonably related to the purposes of the enabling legislation.' " *Guardians Ass'n* v. *Civil Service Commission*, No. 81-431 (July 1, 1983), slip op. 10 (Stevens, J., dissenting). The deference due such an administrative interpretation is particularly compelling "where, as here, the agency participated in developing the provision." *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). The language of Section 1113 ultimately accepted by Congress was largely, in the words of Representative Solomon, "given to us * * * by Secretary Bell with his full approval, with the full approval of the Selective Service Administration." 128 Cong. Rec. H4764 (daily ed. July 28, 1982); see *id.* at H4763.

b. If the Court agrees with our interpretation of Section 1113, nothing remains of appellees' argument (Br. 11) that the law "targets a specific individual or group." Appellees have identified no case decided by this or any other court

holding that a law aimed at future conduct is a bill of attainder. All the cases on which they rely involve legislative punishment of identifiable individuals for past action. See *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 319-320, 327 (1867); *United States* v. *Brown*, 381 U.S. 437, 438-439 n.1, 458 (1965).[3]

Indeed, even if the Court should both disagree with our interpretation of Section 1113 and accept appellees' expansive view of the bill of attainder prohibition, facial invalidation of the statute remains inappropriate. After all, the principal impact of Section 1113 (even if it does not permit late registration) is on young men who, at the time it was enacted, had not yet turned 18 but who would in the future be obliged to register. Even if one assumes that its purpose is to encourage those individuals to register on time (rather than simply to register), the law as applied to them still regulates only conduct that will occur in the future. If in *Cummings* the State of Missouri had passed a law saying that those who, in the future, engaged in armed rebellion against the United States would be ineligible to practice certain licensed professions, this Court would have been presented with a very different question. For in that case the State would not be "inflict[ing] a punishment for a past act which was not punishable at the time it was committed" (71 U.S. (4 Wall.) at 319), but would instead be adopting a regulation designed to discourage rebellion in the future. It is true that Section 1113 reaches some whose period for timely registration had already expired when Section 1113 was enacted on September 8, 1982. But the class covered by

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[3]Appellees do assert (Br. 15) that it is "of little consequence in bill of attainder analysis" that here benefits are conditioned on future conduct. But their only support for that claim is *Brown*'s statement that "[a] number of English bills of attainder were enacted for preventive purposes — * * * based largely on *past acts and associations*" (Br. 15 n.7, quoting *United States* v. *Brown*, 381 U.S. at 458 (emphasis added)).

the district court's nationwide injunction is in no way limited to them. Rather, the court enjoined the government "permanently * * * from in any way enforcing in any state" both the law and its implementing regulations (J.S. App. 36a).

c. Appellees' claim that Section 1113 inflicts punishment (Br. 19-27) rests on the same erroneous assumption that the law withholds aid from late registrants. Having made that assumption, they contend (Br. 23) that Section 1113 is penal rather than regulatory because it "acts as both a disability and a restraint," "impos[es] its sanction before any hearing," "impos[es] retribution against nonregistrants," has no alternative purpose other than punishment, and "is excessively broad" because it applies to negligent as well as willful nonregistrants. But if one starts from the opposite view and accepts the construction given the statute by the Secretary and the Military Selective Service System, those objections dissolve. The law imposes no disability or restraint because everyone (otherwise qualified) can get aid by simply doing what the Selective Service Act requires. For the same reason the law imposes neither sanction nor retribution, and has the obvious alternative purpose of encouraging registration. And given that alternative purpose, it is natural that the law should apply to negligent as well as willful nonregistrants.

Indeed, even if one assumes as appellees do that Section 1113 withholds financial aid from late registrants, it is difficult to conclude that it inflicts punishment within the meaning of the Bill of Attainder Clause. For as we made clear in our opening brief (Br. 21-22), Congress here has inflicted nothing comparable to "the 'infamous punishment' of imprisonment" or other disabilities historically associated with bills of attainder. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960). It has simply made a judgment, indisputably rational, about the appropriate method for allocating

scarce federal aid dollars (Appellants' Br. 23). Since appellees have no preexisting right to those dollars (*San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 37 (1973); see note 4, *infra*), their only dispute is over the wisdom of Congress's exercise of its spending power in this statute.

Appellees seek to bolster their claim of punitive purpose by noting that Section 1113 "is an amendment to, and is codified within, Section 12 of the Military Selective Service Act entitled 'Offenses and Penalties' " (Br. 25). See 50 U.S.C. App. (& Supp. V) 462. But that is hardly decisive of the issue of congressional intent. The sponsor of the amendment in the House, Representative Solomon, explained the reason for including it in the Military Selective Service Act (128 Cong. Rec. H4757 (daily ed. July 28, 1982)):

> The amendment which establishes an additional condition of eligibility for student financial assistance should more properly be a part of the law governing the relevant program, which is the Higher Education Assistance Act; however, because there is an immediate need for this legislation * * * and because there will be no opportunity this year to amend the Higher Education Assistance Act, which is not due for reauthorization until next year, I felt that it was imperative, as did the other body, to offer this amendment to the defense authorization bill.

An argument identical to appellees' was rejected just this Term by this Court. In *United States* v. *One Assortment of 89 Firearms*, No. 82-1047 (Feb. 22, 1984), slip op. 10 n.6, the Court unanimously held:

> Mulcahey relies heavily upon Congress' labeling of § 924 with the appellation "Penalties," arguing that inclusion of the forfeiture provision in that section demonstrates Congress' intent[illegible] to create an additional criminal sanction. This argument is unavailing;

> both criminal and civil sanctions may be labeled "penalties." Moreover, the congressional reports * * * indicat[e] that Congress was cognizant of the important differences between criminal punishment and *in rem* forfeiture.

Congress was equally aware in this case of the difference between criminal punishment and restrictions on the distribution of federal financial aid.[4]

d. Appellees recognize (Br. 27-28) that Section 1113 provides for a hearing whenever there is an issue about whether an applicant has registered. They object, however, that the law is unconstitutional because it fails to provide admitted

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[4]Appellees argue (Br. 20-22) that withholding Title IV aid from nonregistrants is similar to the restrictions on employment held invalid in *Cummings* v. *Missouri, Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), and *United States* v. *Lovett*, 328 U.S. 303 (1946). We addressed this contention in our opening brief (Br. 19-22). Realizing that *Flemming* v. *Nestor*, 363 U.S. 603 (1960), rejected an identical argument, appellees add that "the underpinnings of *Flemming* have been removed" by this Court's decisions in *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970), and *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976). Appellees' Br. 22 n.15.

Goldberg v. *Kelly* held only that AFDC "benefits are a matter of statutory entitlement *for persons qualified to receive them*" (397 U.S. at 262) (emphasis added), and that the Due Process Clause affords *qualified* recipients some protection against erroneous termination of benefits. *Mathews* v. *Eldridge* made the same point with respect to disability benefits. Indeed, *Flemming* v. *Nestor* itself noted that "[t]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611. But neither *Goldberg* nor *Mathews* v. *Eldridge* gave unqualified applicants any substantive right to receive benefits over Congress's objection. Those cases are thus silent on the question being litigated here: whether Congress may make draft registration a qualification for Title IV aid. *Flemming* v. *Nestor*, on the other hand, makes clear that doing so would not be a punishment forbidden by the Bill of Attainder Clause. 363 U.S. at 617.

nonregistrants a hearing before they are "punished" by being denied Title IV aid (Br. 28). This argument is frivolous if Congress may properly decide that nonregistrants do not qualify for assistance. In that case there is simply no factual issue on which nonregistrants have a right to be heard. The only restriction appellees have suggested on Congress's authority to impose such a qualification is that it amounts to "punishment" of a disfavored class. But, once again that claim is insubstantial, because any nonregistrant can qualify for aid by simply registering late, and because in any event the mere withholding of financial assistance is not punishment within the meaning of the Bill of Attainder Clause. See page 6, *supra*.

2. Appellees assert that Section 1113 violates their privilege against compelled self-incrimination in two ways: first, it penalizes nonregistrants "who assert the privilege by denying them access to Title IV funds * * *. Second, the statute's scheme of operation serves to incriminate those * * * who register late" (Br. 31).[5]

a. Appellees' primary Fifth Amendment argument is that Section 1113 somehow compels nonregistrants to confess that they have not registered, by penalizing them for remaining silent (Br. 32-38). Given the obvious and compelling objections to this argument, it is difficult to understand the tenacity with which appellees hold to it.

In the first place, appellees make no effort to address our objection that nonregistrants are subject to no compulsion to confess their dereliction, because they are simply ineligible for Title IV aid. One who insists on not registering would get no benefits even if he did confess to having

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[5]Appellees also argue that the law not only penalizes, but actually incriminates, those nonregistrants who assert the privilege. As we noted in our opening brief (Br. 30 n. 14), this suggestion is baseless.

violated the law. And since there is no advantage to be gained by confessing, it can hardly be said that the law offers any inducement to self-incrimination. Consider a parallel from the Internal Revenue Code: Schedule A to Form 1040 asks the taxpayer to declare what state taxes he has paid, and allows a deduction for such payments. But one who has willfully refused to pay state taxes (a crime under state law) could hardly complain that Schedule A forces him to confess to that crime. Not only is he free to skip that line on Schedule A,[6] but he would not be entitled to the deduction even if he truthfully filled it in.

In the second place, the "penalty" of which appellees speak is illusory in any event because even a willful nonregistrant can qualify for aid by registering late, and as we explain below (pages 14-15), he need not reveal his past violation in the application process. In that respect too, Section 1113 is like the Internal Revenue Code, which permits even one who has willfully failed to pay state taxes on time to take a deduction once payment is actually made. 26 U.S.C. 164(a) ("taxes shall be allowed as a deduction for the taxable year within which paid or accrued").

In the third place, appellees err in supposing that the Fifth Amendment applies in every situation where one who is silent about past criminal activity may lose a governmental benefit or suffer some detriment as a result. See, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-320 (1976); *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). An applicant for employment with the federal government, for example, must fill out a Personal Qualifications Statement (Standard Form 171), which asks:

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[6]Contrast *Marchetti* v. *United States*, 390 U.S. 39 (1968), on which appellees rely (Br. 34-35). There the information requested was not tied to an optional deduction, but to gross receipts. The law in *Marchetti* also imposed an occupational tax and an obligation to register, both of which were unconditional. 390 U.S. at 42-43. Here, it is no crime for nonregistrants not to apply for Title IV assistance.

20. A. Have you ever served on active duty in the United States military service?

B. Have you ever been discharged from the armed services under other than honorable conditions? * * * If "YES", give details in item 34.

* * * * *

28. Within the last five years have you been fired from any job for any reason?

29. Within the last five years have you quit a job after being notified that you would be fired? If your answer to 28 or 29 above is "YES", give details * * * and reasons in each case.

It requires little imagination to see that answers to those questions could "furnish a link in a chain of evidence to prosecute" (Appellees' Br. 30). Yet it can hardly be supposed that the government is forbidden to ask them —or to ask, for instance, whether the applicant is a user of controlled substances (see *New York Transit Authority* v. *Beazer*, 440 U.S. 568 (1979))—simply because such questions may have the desired effect of distinguishing among those it does and does not wish to hire.

Indeed, Title IV benefits themselves are made available only to American citizens and permanent residents, and not to illegal aliens. See, *e.g.*, 34 C.F.R. 690.4(a)(4) (Pell grants). And the application which students complete to demonstrate their eligibility for assistance requires them to verify their citizenship or permanent resident status, just as the form at issue here asks the student to verify his draft registration. Many who have entered the country illegally would, by revealing that fact on the form, provide evidence that could be used to prosecute them. But they are hardly

entitled to insist for that reason that the government cease asking applicants whether they satisfy the eligibility requirements.[7]

Appellees rely on cases in which a government employee, for example, is summoned before a grand jury and ordered to testify (and to waive his immunity from prosecution based on his testimony), on pain of losing his job. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). But as those cases recognize:

> public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.

Lefkowitz v. *Cunningham*, 431 U.S. at 806. Thus a policeman who has taken a bribe may be presented with the choice of testifying to that fact under immunity (and losing his job), and refusing to testify (and losing his job). When one does not have a job, but is merely filling out a job application, the issue of immunity is irrelevant because he has not been ordered to testify. But the Fifth Amendment does not entitle him to the job simply because he cannot truthfully complete the application. So too with the appellees here: they are unable truthfully to show their eligibility for financial aid, and so are ineligible for assistance.

b. Appellees also assert (Br. 38-42) that Section 1113 violates the Fifth Amendment rights of late registrants because "the statute's scheme of operation" (Br. 31) requires

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[7]Similarly, it should be pointed out that this lawful residence requirement seems to be as much a bill of attainder as the eligibility provision based on draft registration status that is under attack here.

them to disclose their crime of untimely registration. This claim too is without merit.

It is true, as we pointed out in our opening brief (Br. 17 n.7), that willful failure to register within the time fixed by Proclamation No. 4771, 45 Fed. Reg. 45247 (1980), is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462. It is also true that one cannot register late without disclosing his untimely action, since the registration card (see 32 C.F.R. 1615.1) that a registrant fills out at the post office must be dated, and asks for the his birth date. The Military Selective Service Act nonetheless imposes a continuing obligation to register, even after the 30-day period fixed by Proclamation No. 4771 has expired. 50 U.S.C. App. 462(d).[8]

But the district court found no fault with Section 462, nor do appellees challenge its requirements here. The issue is rather the validity of Section 1113. Late registration, though otherwise punishable, does not disqualify the registrant for benefits under that section. Nor does anything in Section 1113 require the applicant for financial aid to disclose the fact of late registration. 50 U.S.C. App. 462(f)(3),

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[8]Section 462(d) provides that the statute of limitations for nonregistration shall be five years from "the last day before such person attains the age of twenty-six, or * * * [from] the last day before such person does perform his duty to register, whichever shall first occur." That provision was enacted to overcome the result of *Toussie* v. *United States*, 397 U.S. 112 (1970), which held that the failure to register was not a continuing offense. S. Rep. 92-93, 92d Cong., 1st Sess. 22 (1971). Congress deemed the provision "appropriate * * * as a deterrent to nonregistration * * * [and] as a reflection of equity to those men who comply with the Act's registration requirements and remain liable at least to age 26" (*ibid.*).

Justice White, dissenting in *Toussie*, noted that the continuing obligation to register presented no Fifth Amendment problem, since the incentive to register late (doing so starts the statute of limitations running) did not "amount to 'compulsion' for purposes of the Fifth Amendment" (397 U.S. at 134).

on which appellees rely (Br. 40), does say that schools may be required "to provide a list to the Secretary of Education or the Director of persons who have submitted * * * statements of compliance." But that presumes only that applicants for aid will verify that they have complied at the time of application, not state when they complied.

Appellees assert that the Secretary's regulations require applicants for aid to disclose the fact of late registration (Br. 40-41). Even if that were so it would call in question only the validity of the regulations, not the statute. But it is not so. The regulation to which appellees refer, 34 C.F.R. 668.26(d), establishes the method for verification to be used in academic years beginning on or after July 1, 1985 (34 C.F.R. 668.26(a)). It states:

> (d) Documentation that may be used to verify registration compliance includes —
>
> (1) A copy of the student's registration Acknowledgement Letter (SSS Form 3A or 3A-s);
>
> (2) The financial aid transcript prepared pursuant to § 668.14 bearing the student's Selective Service number; or
>
> (3) Other documentation from the Selective Service System, if approved by the Secretary and the Director of the Selective Service System.

Appellees claim that SSS Form 3A, because it includes both the applicant's birth date and date of registration, informs the school that he has registered late — information the school could presumably pass along to the Secretary or the Director. But of course the Director already has a copy of the student's Form 3A; it was the Selective Service System that sent it to the student when he registered. Moreover, the requirements of Section 668.26(a) (which do not become effective until 1985) have not been, and may never be, applied to appellees. And in any event Form 3A is only one

of three methods prescribed for verification. The other two do not require the revelations appellees find so objectionable.[9]

c. We feel obliged to point out the air of unreality surrounding appellees' claim that Section 1113 compels late registrants to incriminate themselves. As we advised the district court, no registrant has ever been prosecuted for late registration. It is the policy of the Department of Justice that no one will be prosecuted who voluntarily registers prior to the time he has been designated for investigation and possible prosecution.[10] "It is well established that the privilege protects against real dangers, not remote and speculative possibilities." *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972). Cf. *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.) ("The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."). Although we cannot say that the policy against prosecuting late registrants is immutable, the possibility that any of the appellees would be prosecuted — were they

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[9]Since 34 C.F.R. 668.26(d) does not apply to aid applications for academic years before July 1985, the Secretary and the Director have not yet had occasion to prescribe what "[o]ther documentation" — besides a financial aid transcript with the student's Selective Service number — will suffice. Until the 1985-1986 academic year the Secretary is verifying registration status through "periodic on-site program reviews." 48 Fed. Reg. 15578 (1983). The Secretary and the Director will then "review the compliance process set forth in § 668.26. If [they] determine that the requirements are not necessary, the Secretary, with the concurrence of the Director, may amend or revoke § 668.26." 48 Fed. Reg. 15578 (1983).

[10]In fact, the Department's current policy is to permit even those who have been designated for possible prosecution a last opportunity to avoid criminal charges by registering. The Department now has this policy under review. If experience demonstrates that it is undermining voluntary compliance with the registration law, it will be changed.

to register now — is sufficiently "remote and speculative" that the privilege against self-incrimination has no role to play in this case.

3. Although the district court did not reach the issue, appellees also claim that Section 1113 violates the equal protection component of due process in two ways. First, they assert that it "significantly burdens access of less wealthy nonregistrants to education and therefore amounts to invidious discrimination" (Br. 45). Second, they claim it "unleashes a dual system of Selective Service law enforcement keyed to wealth" (*ibid.*). These claims are frivolous.[11]

Appellees' claims both ultimately reduce to an assertion that Section 1113 favors wealthy nonregistrants pursuing post-secondary education over similarly situated poorer nonregistrants. But Section 1113 treats both groups in identical fashion: neither is eligible for Title IV assistance. Contrast *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (nonresidents required to pay higher tuition and fees than residents); *Plyler* v. *Doe*, 457 U.S. 202 (1982) (undocumented

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[11]Several of the amici advance the argument—not addressed by the district court nor pursued by appellees here— that Section 1113 unjustifiably discriminates on the basis of gender (Amicus Br. of the University of Minnesota et al. 25-27; Amicus Br. of Swarthmore College et al. 8-9). This argument overlooks the obvious fact that men and women are not similarly situated with respect to the aims of the law. Section 1113 is written in gender-neutral terms — "Any person who is required [to register] and fails to do so * * * shall be ineligible for [Title IV aid]." It is true that only men are required to register, but this Court has already determined that that distinction between men and women is constitutionally proper. *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). Appellees have not suggested that the difference in impact that Section 1113 has on men and women can be traced to any impermissible stereotype about the proper roles of men and women — *e.g.*, that women should attend college and men not. Contrast *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 729-730 (1982). The impact instead results from an intent to encourage registration, just as the impact of a veterans' preference statute results from an intent to reward service. *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979).

school-age children denied free public education given to citizens and legally admitted aliens). Title IV, unlike Section 1113, does treat the two groups differently; but what it says is that the wealthy — unlike the less affluent — are ineligible for aid even if they do register. 20 U.S.C. 1089; Pub. L. No. 98-79, § 4, 97 Stat. 479-480. It is true that wealthy nonregistrants may still be able to pay for education that poorer nonregistrants cannot afford. But that fact alone hardly suffices to invalidate Section 1113 if, as we made clear in our opening brief (Br. 22-24), the law is rationally related to a legitimate governmental objective. *Harris* v. *McRae*, 448 U.S. 297, 322-324 (1980); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

In any event this claim, like appellees' bill of attainder and self-incrimination claims, depends on the erroneous assumption that Section 1113 "significantly burdens" poor nonregistrants' ability to get Title IV aid (Appellees' Br. 45). If any financially needy student can qualify for assistance simply by registering late, as the statute permits, then the only thing that stands between a poor nonregistrant and federal aid is his refusal to do what the Military Selective Service Act lawfully requires.[12]

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[12]Amici Swarthmore College et al. argue that Section 1113 unconstitutionally infringes First Amendment rights held by schools themselves "to determine whom they will enroll" (Br. 16). They also contend that the law "introduces an alien element into the educational process" by requiring schools to report registration information to the government (*ibid.*). Finally, they claim that "Section 1113 may interfere with the First Amendment rights of faculty and administrators who conscientiously object to military participation" (*id.* at 18). This Court recently rejected similar claims in the context of Title IV aid in *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984), slip op. 19.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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No. 83-276

In The

Supreme Court of the United States

October Term, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

BRADLEY BOE, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

[redacted] SWARTHMORE COLLEGE, HAVERFORD COLLEGE, OBERLIN COLLEGE AND EARLHAM COLLEGE, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

BRIEF OF SWARTHMORE COLLEGE, HAVERFORD COLLEGE, OBERLIN COLLEGE AND EARLHAM COLLEGE, AS AMICI CURIAE IN SUPPORT OF APPELLEES

ALAN R. HUNT
THOMAS P. PRESTON*
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6324 and 854-6237

ROBERT D. WILLIAMS
RICHARD L. BERKMAN
MARK C. RAHDERT
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3739

Counsel for Amici Swarthmore College, Haverford College, et al.

*Counsel of Record

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the right to equal protection under the due process clause of the Fifth Amendment.

2. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the rights to freedom of association and free speech protected by the First Amendment.

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Swarthmore College, Haverford College, Oberlin College and Earlham College ("amici") respectfully move this Court for leave to file the attached BRIEF OF SWARTHMORE COLLEGE, HAVERFORD COLLEGE, OBERLIN COLLEGE AND EARLHAM COLLEGE, AS AMICI CURIAE IN SUPPORT OF APPELLEES. The grounds for this Motion are stated below.

I. The Parties To This Appeal Have Consented To The Filing Of This Brief.

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Swarthmore College has, on behalf of all the colleges joining this brief, requested and received consent for the filing of this brief from the appellants, Selective Service System, *et al.* ("the government") and from the appellees, Minnesota Public Interest Research Group, *et al.* and Bradley Boe, *et al.* Letters memorializing their consent have been appended hereto. *See* App. A, *infra.*

II. Interest Of Amici.

The amici are all small, independent, co-educational liberal arts colleges, and each of them presently participates in federal educational assistance programs provided under Title IV of the Higher Education Act of 1965, 20 U.S.C. 1070 *et seq.* All of the colleges are subject to Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* ("Section 1113"), and if the statute's constitutionality is sustained, they will be required to enforce it by obtaining certifications of registration compliance from their students who apply for federal financial assistance.

Since educational costs are significantly greater at these colleges than at most other private colleges and universities around the country, and since each of the colleges is committed to the goal of attracting a diverse student body representing a wide range of socioeconomic backgrounds, a high proportion of the students attending these colleges need some form of federal financial aid. For example, in the academic year 1982-83, 58% of Swarthmore's students received Title IV federal assistance. At

Oberlin, 60% of all students receive some form of federal financial assistance. Both the colleges and their students will be directly affected by Section 1113 if it is allowed to stand.

In addition, several of the amici, for historical reasons, are particularly sensitive to a statutory requirement which indirectly aids the processes of military conscription. Swarthmore, Haverford, and Earlham Colleges, for example, were founded by members of the Religious Society of Friends (Quakers), a religious group committed to pacifism.

As non-sectarian institutions, these colleges enroll students of various backgrounds and faiths, some of whom conscientiously object to military service. Section 1113 will have a profound impact on the character of these colleges' learning environments and will violate First Amendment rights, as discussed in the attached brief.

Furthermore, the administrative burden imposed on all amici by the regulations issued by the Department of Education to implement Section 1113 (issued April 11, 1983, 48 Fed. Reg. 15578), when fully phased in two years from now, will be enormous. Under the present regulations, colleges will then be required not only to obtain certifications of registration from applicants for federal financial assistance, but also to collect evidence verifying that the certifications are accurate. The amici certainly would be willing to undertake such administrative burdens if they served a valid educational purpose. However, the duties imposed by Section 1113 bear no perceivable relation to any legitimate educational goal.

For these and other reasons, amici are deeply concerned about the outcome of this case, and have a significant stake in it.

III. Questions That Have Not Been Adequately Presented.

Appellees have thoroughly treated the issues on which the District Court's decision rests, namely, whether Section 1113 is an unconstitutional bill of attainder and whether it violates students' privilege against self-incrimination. Amici agree with appellees and the District Court on those issues and do not propose to discuss them here.

However, neither the government nor the appellees have adequately addressed certain other issues of constitutional import that bear directly on the outcome of this case. Specifically, amici believe that Section 1113 discriminates on the basis of gender and that it lacks a sufficient governmental interest to support resort to such a disfavored classification. This defect, moreover, is exacerbated by the fact that Section 1113 operates to deprive certain students of their quasi-fundamental right to an education. Finally, Section 1113 abridges rights of academic freedom and association that are guaranteed by the First Amendent. Although the District Court did not rely on these factors in striking down the statute, they are additional grounds for affirmance.

For the foregoing reasons, we respectfully ask the Court's leave to file the attached brief addressing the important equal protection and First Amendment issues at stake in this litigation.

Respectfully submitted,

ROBERT D. WILLIAMS
RICHARD L. BERKMAN
MARK C. RAHDERT
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3739

ALAN R. HUNT
THOMAS P. PRESTON*
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6324 and 854-6237

Counsel for Amici Swarthmore College, Haverford College, et al.

*Counsel of Record

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STATEMENT OF THE CASE

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* (codified at 50 U.S.C. App. 462(f)) ("Section 1113"), imposes a new and unparalleled burden on students seeking

federal educational assistance and on the colleges and universities that participate in federal aid programs. Such assistance has long been available under Title IV of the Higher Education Act of 1965, 20 U.S.C. (and Supp. V) 1070 *et seq.* Under the terms of Section 1113, students required to register for military service under Section 3 of the Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453, are ineligible for federal educational assistance under Title IV unless they have complied with the draft registration requirement. All students, whether subject to the provisions of the Military Selective Service Act or not, are required, pursuant to the Section 1113 regulations, to file statements of registration compliance prior to receiving Title IV funds.

Appellees, who are college students and a student organization, brought an action in the United States District Court for the District of Minnesota seeking to enjoin Section 1113 as unconstitutional. On June 16, 1983, the District Court entered a final judgment and decree declaring Section 1113 unconstitutional and enjoining its enforcement. On June 29, 1983, this Court stayed the District Court's June 16 order, thus permitting Section 1113 to go into effect. The government then brought an appeal directly to this Court pursuant to 28 U.S.C. 1252, and on December 5, 1983, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

There is no question that the sole purpose behind Section 1113 is to aid in the enforcement of the draft registration law by punishing college students who have failed to register by denying them federal financial aid. Amici believe that such intertwining of draft registration and education is unconstitutional.

Section 1113 endangers the diversity of college student bodies by curtailing the ability of certain groups of male students—such as those with limited financial resources and those holding dissident pacifist views — to attend. Further, by making colleges and universities central to the enforcement of its provisions, the statute has imposed significant burdens on all higher educational institutions. Such burdens are constitutionally offensive when, as here, they are imposed for no educational purpose.

Section 1113 thus impairs the freedom of our institutions of higher learning. The statute isolates particular groups of male students for special, adverse treatment in an area — education — totally unrelated to the objective of military conscription that the statute is designed to advance. At the same time, Section 1113 forces the colleges and universities to adopt a posture with their students which is at best unrelated to their educational pursuits, and at worst makes that relationship adversarial.

As a result, the statute violates both the principles of equal protection embodied in the concept of due process, and the guarantees of free expression and association under the First Amendment.

ARGUMENT

I. Section 1113 Violates The Principles Of The Equal Protection Clause

A. Section 1113's Classification Based On Gender Cannot Survive The Strict Scrutiny Such Classifications Require.

Section 1113 denies federal education assistance to any individual required to register with the Selective Service who does not do so. Since only males must register, *Rostker v. Goldberg*, 453 U.S. 57 (1981), the provision penalizes only male students. While male-only draft registration has been constitutionally approved, *Rostker, supra*, Section 1113 impermissibly extends this gender classification into the areas of eligibility for federal education assistance, an area in which gender is irrelevant and any classification based thereon is constitutionally objectionable.

This Court held in *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980), that a gender-based distinction can only be supported by a showing that it serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." The fact that "this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982)

(footnotes omitted). Thus, the gender classification in this statute must be supported by an "exceedingly persuasive justification." *Id.* at 724.

There is no such justification in this case. In *Rostker*, this Court held that gender differences influence combat roles and military needs, and therefore justify all-male draft registration. Those distinctions have no relationship to the allocation of educational financial aid funds, which is the issue here. This is "a case of Congress arbitrarily choosing to burden one of two similarly situated groups." *Rostker, supra,* at 78.

For purposes of federal financial assistance to college students, any distinction based on gender is invidious. There can be no question that in this case, unlike the case in *Rostker, supra,* men and women are similarly situated; and the "Constitution requires that Congress treat [such] similarly situated persons similarly." *Id.* at 79.[1] Section 1113 neither treats people similarly nor is it based on any sound policy justifying the gender classification. Therefore, the statute must be stricken for violating the principles of equal protection.

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[1] Various members of Congress recognized that Section 1113 unjustifiably discriminates on the basis of gender. Representative Patterson, for example, commented:

> [T]his amendment is highly discriminatory. Since only males are required to register for the draft, and since needy students are the recipients of student aid assistance, it punishes our country's needy, male students.

Cong. Record H4760 (daily ed. July 28, 1982) (Rep. Patterson).

B. Section 1113 Unconstitutionally Burdens The Quasi-Fundamental Right To Education, And Therefore Should Be Subject To Heightened Scrutiny.

Additional infirmities of Section 1113 are revealed in light of this Court's recent decision in *Plyler v. Doe*, 457 U.S. 202 (1982). Section 1113 unjustifiably burdens the ability of students to obtain access to education, recognized in *Plyler* as a quasi-fundamental right.

This Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (footnotes omitted). The Court also has not hesitated to strike down laws that unfairly burden a "significant interest," without requiring the interest to be a "fundamental right." *See, e.g., Bearden v. Georgia*, — U.S. —, 103 S. Ct. 2064, 2072 (1983) (poor probationer's interest in staying out of jail); *Plyler, supra.*

In *Plyler*, this Court established the constitutional importance of the right to education, albeit at the elementary level:

> Public education is not a "right" granted to individuals by the Constitution. *San Antonio School District, supra*, 411 U.S., at 35. *But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation.* Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and the acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). We have recognized "the public schools as a most vital civic institution for the preser-

> vation of a democratic system of government," *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (BRENNAN J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). As noted early in our history, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are able to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." *Ambach v. Norwick, supra*, 411 U.S., at 77. *In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.*

Plyler, supra, at 221 (emphasis added). The *Plyler* Court rejected the notion that "a concern for the preservation of resources standing alone could justify the classification used in allocating those resources. . . . [The legislature] *must do more than justify its classification with a concise expression of an intention to discriminate.*" *Plyler, supra*, at 227 (emphasis added).

As Justice White has recognized, the same importance attaches, and consequently a higher level of review is appropriate, in cases involving higher education:

> Here, *it is enough for me that the interest involved is that of obtaining a higher education*, that the difference between in-state and out-of-state tuition is substantial, and that the State, without sufficient

> justification, imposes a one-year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough *that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination* among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.

Vlandis v. Kline, 412 U.S. 441, 459 (1973) (White, J., concurring) (emphasis added).

This case raises precisely the kinds of questions *Plyler* addressed. Section 1113 burdens the quasi-fundamental right of one group in our society — financially needy males — to obtain a college education on the same basis as all other groups.[2] The reasons for this denial

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[2] That the statute falls most heavily upon the financially needy was well-recognized in Congress. According to Representative Moffett, for example, Section 1113

> . . . is blatantly discriminatory. Only low-income and middle-income students will be caught in this trap. If a student comes from a wealthy background, is capable of financing his education privately, [Section 1113] does not punish him. However, if a student is poor or from a middle-income background, the full force of [Section 1113] is applied.

Cong. Record H4758 (daily ed. July 28, 1982). Indeed, Representative Solomon, the bill's sponsor, recognized the legislation's impact upon financially needy students. Cong. Record H4767 (daily ed. July 28, 1982).

In addition to its impact upon the needy, Section 1113 also discriminates against minorities, since minority students receive a disproportionately large share of all federal financial aid. As much as 49.5 percent of all federal aid

(Continued on the following page)

have nothing to do with educational policy. There is no justification for the blatant discrimination Section 1113 requires. Furthermore, there are already effective and constitutional means of enforcing the draft law which do not involve invidious distinctions: 50 U.S.C. App. 462(a) prescribes a penalty of 5 years in prison, a $10,000 fine, or both, for those who fail to register.

The right to an education is too basic; the governmental need for this discrimination is too tenuous. The Court must not permit the misuse of educational policy to meet external goals without a stronger need and a better justification than the government can demonstrate in this case.

II. Section 1113 Unconstitutionally Infringes Rights Guaranteed By The First Amendment.

A. The Statute Interferes With Freedom Of Association And Speech In Colleges And Universities.

This Court long has recognized that the rights of free speech and assembly afforded by the First Amendment entail a constitutionally protected right to freedom of association. *See, e.g., Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S.

(Continued from the previous page)

under the four post-secondary student aid programs is received by nonwhites. United States Department of Education, Office of Student Financial Assistance, *O.S.F.A. Program Handbook* 16 (1982) (data for 1978-79 academic year). Nonwhites nevertheless account for less than 14 percent of all college students. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract 159-60 (1982).

449 (1959). Nowhere is this right more essential to American democracy than it is on college and university campuses. As this Court declared in *Healy v. James*, 408 U.S. 169, 180-81 (1972):

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the " 'marketplace of ideas,' " and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

See also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self evident.")

Because of this constitutionally based commitment to academic freedom, governmental interference in the academic process has been sharply limited. The government may punish neither students nor teachers for their peaceful political expression. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Nor may they be punished for their political associations. *Healy v. James, supra; Sweezy v. New Hampshire, supra.* In addition, the government is not permitted to restrict what ideas may be taught or expressed, either in the name of some official dogma or to enforce popularly held notions of moral-

ity or patriotism. *Epperson v. Arkansas,* 393 U.S. 97 (1968); *West Virginia v. Barnette,* 319 U.S. 624 (1943); *Meyer v. Nebraska,* 262 U.S. 390 (1923). The danger recognized in all these decisions is that the government, if it is permitted to interfere at will with academic processes, will "cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents, supra,* 385 U.S. 589, 603.

These fundamental rights are held not only by the individual students and teachers, but also by the academic institutions themselves. In his concurrence in *Sweezy v. New Hampshire,* for example, Justice Frankfurter recognized four essential freedoms of a college or university which are protected by the First Amendment: the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 263 (quoting a statement of senior South African scholars). Preserving these freedoms requires "the exclusion of governmental intervention in the intellectual life of a university," because "[a] university ceases to be true to its own nature if it becomes the tool of . . . [the] State." *Id.* Justice Frankfurter's view of the First Amendment protections afforded to colleges and universities was reaffirmed and extended in *Board of Regents v. Bakke,* 438 U.S. 265 (1978). There, Justice Powell, writing for a plurality of the Court, recognized that the First Amendment right to academic freedom includes a right of colleges and universities to a "diverse" student body. *Id.* at 311-12.

Section 1113 infringes these fundamental rights in three important ways. First, the statute interferes with the colleges' ability to determine whom they will enroll.

Second, the statute interferes with the academic process itself by disrupting the atmosphere of free exchange between the student and the administration/faculty. Finally, the statute may affect the First Amendment rights of some faculty and administrators by imposing legal duties, enforceable by criminal penalties, to assist in the process of conscription.

By restricting the availability of federal assistance, Section 1113 is designed to and will impair the ability of certain students — those either unable or unwilling as a matter of conscience to meet the certification requirements — to attend the college of their choice. Particularly at schools such as amici, where tuition costs are high, colleges may be forced to turn away students whom they would otherwise enroll; while students may be forced to select colleges other than those they would prefer to attend, or sometimes to forgo attendance at college altogether.

Section 1113 thus adversely restricts diversity in college student bodies. Additionally, Section 1113's impact will fall most greatly on those who, for reasons of conscience, are opposed to draft registration. The result will be a loss in diversity of viewpoints, particularly those critical of national war and defense policies.

Beyond its adverse impact upon the colleges' right to determine whom they will enroll, Section 1113 will also affect daily academic life. The statutory duty placed upon colleges and universities to assist the federal government in its law enforcement activities by obtaining certifications, and ultimately verifications, of registration introduces an alien element into the educational process. Rather than serving their proper function, col-

lege faculty and administrators involved in carrying out this law will be forced into the mold of "informants" — collectors and reporters to the government of information, unrelated to education, that could subject some students to criminal penalties.[3] Furthermore, they are required to assist the federal government in punishment, solely on the basis of legislatively presumed conduct outside the college walls, of students who are opposed to draft registration, in circumstances where the college's intrusion into student privacy bears no relationship to educational goals.[4] Although this impact is likely to be felt by all institutions of higher education, it is particularly strong on colleges which, like some of the amici, have historically resisted governmental intrusion in academic affairs, have

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[3] See note 5, *infra*. This effect will become particularly harsh in 1985 when the regulations issued under Section 1113, see 48 Fed. Reg. 15578 (April 11, 1983), take full effect. At that point the colleges will be required not only to obtain student certifications of compliance, but also to obtain evidence verifying the certifications.

[4] If Section 1113 is permitted to stand, Congress will be free to enact a broad array of similar measures, in each forcing the colleges and universities, in the guise of administrators of a benefits program, into the odious position of being forced to withhold educational assistance based on presumed personal behavior inconsistent with popular social mores. For example, Congress could then require, as conditions for student assistance, that colleges obtain certifications from their students that they had never engaged in any act of civil disobedience, that they had never participated in any unlawful demonstration or civil disturbance, that they had never unlawfully received medicaid funds or food stamps, or that they had never obtained unlawful abortions. Such measures, like Section 1113, would introduce an air of suspicion in the relations between students and their colleges that could seriously impair the free flow of ideas and viewpoints in the college environment, without advancing any goal even remotely related to higher education.

followed a policy of non-alignment with governmental defense policies, and have enrolled students with conscientious objections to armed conflict and military conscription.

Finally, by forcing colleges to assist in the process of military conscription, Section 1113 may interfere with the First Amendment rights of faculty and administrators who conscientiously object to military participation. These individuals will be faced with the difficult choice of either refusing to participate in the verification process — a refusal creating potential criminal liabilities for the individuals involved,[5] as well as the loss of critical educational funding for the institution — or surrendering their own personal religious or moral convictions. To the extent this occurs, the colleges' associational rights with these individuals will also be infringed.

B. Section 1113's Impact Upon First Amendment Freedoms Cannot Be Justified.

Because protected rights of expression and association are infringed, Section 1113 cannot be sustained un-

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[5] 50 U.S.C. 462(a) provides in part:

> "Any . . . person charged . . . with the duty of carrying out any of the provisions of this title or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person who shall knowingly make . . . any false statement or certificate regarding or bearing upon a classification . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment . . . ."

less it is supported by "an important or substantial governmental interest" which is "unrelated to the suppression of free expression," and unless circumscription of First Amendment rights is "no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1969). *See also Elrod v. Burns*, 427 U.S. 347, 360-63 (1976); *Healy v. James, supra.* Section 1113 clearly fails this test.

Here, the burden upon First Amendment freedoms is significant. Because federal educational assistance has become vital to the financing of higher education, particularly in private institutions, forgoing participation in Title IV would seriously impair a college's ability to attract the students it wishes to enroll, while continuing in the program will infringe its associational rights. Moreover, since participation in the registration compliance program requires college intrusion into students' personal affairs and personal beliefs, students will certainly be chilled from seeking advice or counseling regarding registration; and they may also be chilled from participating in draft protest activities or otherwise engaging in criticism of American military policies for fear that these activities, too, will lead to withdrawal of financial aid. The whole tenor of student relations with their college will be changed by the fact that the college has been forced to become an investigating unit serving the federal government and, more particularly, the Selective Service System.

Against these significant burdens on academic freedom, Section 1113 fails to serve any compelling state interest. It is no defense to argue, as the government does, that the legislation merely conditions the conferring of a privilege or benefit that the government may allocate

as it chooses. To the contrary, it has long been recognized that even where governmental benefits are involved, strict scrutiny of the justifications for conditioning those benefits in a manner that interferes with First Amendment freedoms is required. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 (1977); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 518, 526 (1958). "The Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James, supra*, 408 U.S. at 183. As the Court stated in *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960): "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influences."

The only legitimate interest the government can assert for this legislation is keeping track of draft registrants.[6] This purpose is insubstantial. Beyond that, it can easily be accomplished by less cumbersome and less intrusive means. Neither college investigation of its students nor a condition for educational assistance eligibility is needed. Indeed, requiring certificates of registration only from college aid applicants makes no sense because they represent but a small portion of the total pool of

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[6] The government's purported justifications of "encouraging" draft registration and denying federal support to "lawbreakers" are not adequate purposes supporting this legislation. Amici agree with appellees and the District Court that in actuality the statute is a legislatively determined punishment amounting to an unconstitutional bill of attainder, so that the purported military justification is constitutionally unsupportable. Furthermore, any "encouragement" of draft registration is speculative and will be extremely limited in scope, since it will affect only financially needy male college students, a small segment of the draft age male population.

draft registrants, and there is no reason to require information from them that is not required from others.

In sum, precious First Amendment freedoms of colleges and universities, their students, faculty, and administrators are jeopardized by Section 1113's addition of draft registration compliance to the requirements for eligibility for funds under Title IV. There is no compelling or substantial reason why these rights must be infringed. Accordingly, the guarantees of the First Amendment are an additional ground for holding Section 1113 unconstitutional.

CONCLUSION

For the reasons stated above, the decision of the United States District Court for the District of Minnesota should be affirmed.

Respectfully submitted,

ALAN R. HUNT
THOMAS P. PRESTON*
DUANE, MORRIS & HECKSCHER

1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6324 and 854-6237

ROBERT D. WILLIAMS
RICHARD L. BERKMAN
MARK C. RAHDERT
DECHERT PRICE & RHOADS

3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3739

Counsel for Amici Swarthmore College, Haverford College, et al.

*Counsel of Record

APPENDIX A

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530

December 29, 1983

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, PA 19102

Re: Selective Service Systems, et al.
v. MPIRG, et al., No. 83-276

Dear Mr. Preston:

In response to your letter of December 20, 1983, I hereby consent, on behalf of the federal parties, to the filing of a brief amicus curiae in the Supreme Court of the United States on behalf of Swarthmore College in the above case.

Sincerely,

/s/ Rex E. Lee
Solicitor General

DORSEY & WHITNEY
A Partnership Including Professional Corporation
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2600
Telex: 29-0605
Telecopier: (612) 340-2868

JAMES E. DORSEY
(612) 343-7988

880 West First National Bank Building
St. Paul, Minnesota 55101
(612) 227-8017

P.O. Box 848
340 First National Bank Building
Rochester, Minnesota 55903
(507) 288-3156

312 First National Bank Building
Wayzata, Minnesota 55391
(612) 475-0373

201 Davidson Building
8 Third Street North
Great Falls, Montana 59401
(406) 727-3632

Suite 675 North
1800 M Street N.W.
Washington, D.C. 20036
(202) 296-2780

30 Rue La Boetie
75008 Paris, France
Tel: (1) 562 32 50

December 29, 1983

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, Pennsylvania 19102

Re: Selective Service Systems, et al.
vs. MPIRG, et al.

Dear Mr. Preston:

On behalf of our clients, John Doe, Paul Poe, and Richard Roe, appellees in the above-referenced action, we agree not to oppose the joint petition of Swarthmore

College and other colleges and universities for leave to participate as *amici curiae* in that action.

Very truly yours,

/s/ James E. Dorsey III
for DORSEY & WHITNEY

JED:pro
cc: E. Gail Suchman, Esq.

MINNESOTA PUBLIC INTEREST
RESEARCH GROUP

2412 University Avenue Southeast
Minneapolis, Minnesota 55414
(612) 376-7554

January 5, 1984

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, Pennsylvania 19102

Re: *Selective Service Systems, et al. v. MPIRG, et al.* U.S. Sup. Ct. No. 83-276

Dear Mr. Preston:

This is to inform you, on behalf of our clients, the Minnesota Public Interest Research Group, Bradley Boe, Carl Coe and Frank Foe, appellees in the above-captioned action, that we have no objection to the joint petition of Swarthmore College and other colleges and universities for leave to participate as *amici curiae* in that action.

Very truly yours,

/s/ E. Gail Suchman
Counsel for Minnesota Public
Interest Research Group,
Bradley Boe, Carl Coe and
Frank Foe

cc: William Keppel, Esq.

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530

January 18, 1984

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, Pennsylvania 19102

Re: Selective Service Systems, et al. v. Minnesota Public Interest Research Group, et al., No. 83-276

Dear Mr. Preston:

As requested in your letter of January 13, 1984, I hereby consent to the filing of a brief *amicus curiae* on behalf of Hampshire College, Oberlin College, Wellesley College, Haverford College, and Earlham College.

Sincerely,

/s/ Rex E. Lee
Solicitor General

Office - Supreme Court, U.S.
FILED
JAN 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
APPELLANTS,

v.

MINNESOTA PUBLIC INTEREST
RESEARCH GROUP, ET AL.,
APPELLEES.

On Appeal From the United States District Court For the District of Minnesota

BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

PETER B. ELLIS *
GERALD L. NEUMAN
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
Attorneys for Amicus Curiae

Of Counsel:
WILLIAM BURNETT HARVEY
General Counsel
Boston University
141 Bay State Road
Boston, Massachusetts 02215
(617) 353-2326

* Counsel of Record

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Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 19,24-25, 35-41

Orloff v. Willoughby, 345 U.S. 83 (1953) 51

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128 Cong. Rec. S4943-S4945 (daily ed. May 12, 1982) . .8-11,29,34, 42

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8 C. Wright & A. Miller, Federal Practice & Procedure, §2018 53

4 Moore's Federal Practice, §26-60[6] 53

Note, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330 (1962). 21,31

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-276

SELECTIVE SERVICE SYSTEM, ET AL.,

APPELLANTS,

v.

MINNESOTA PUBLIC INTEREST
RESEARCH GROUP, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MINNESOTA

BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF APPPELLANTS

INTEREST OF AMICUS CURIAE

The Trustees of Boston University was chartered by statute of the Commonwealth of Massachusetts in 1869 as a body corporate not for profit.* It operates Boston University, an institution located in Boston, Massachusetts, comprising sixteen Schools and Colleges which provide a diverse educational program for undergraduate, postgraduate, and professional students. The total student population of the University is now approximately 28,000; its instructional staff in the several professorial ranks and instructorships numbers 2549. Many of the University's students receive financial aid of the kind involved in this litigation.

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* Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk.

The educational mission of Boston University is not confined to transmission of the bodies of knowledge and modes of inquiry cognate to the various disciplines in which instruction is offered, but encompasses preparation of its students to become responsible members of a democratic society. As part of this effort, the University seeks to develop in each student a sensitivity to the intimate link between enjoyment of the benefits of membership in a society and participation in the burdens of keeping that society strong, vital and free. The University sees an affirmation of that link in the statute under challenge in this suit.

SUMMARY OF ARGUMENT

Section 1113 establishes a wholly legitimate eligibility criterion for federal financial aid to students, namely, that any applicant who is required by law to register with Selective Service must certify before receiving financial aid that he has completed his registration. The District Court erroneously construed the statute as permanently disqualifying any student whose registration is even a day late. This construction, on which appellees rely to bolster their arguments, has no support in the language or the legislative history of Section 1113, and contradicts the presumptively correct administrative interpretation.

Even if the District Court's interpretation were correct, Section 1113 would not constitute a bill of attainder. It merely sets forth conditions for

future receipt of federal benefits, defined in terms of standards of conduct laid down by general law. Section 1113 subjects no individual or group to "trial by legislature"; it offends neither the letter nor the spirit of the Bill of Attainder Clause.

Nor do the procedures that implement Section 1113 conflict with appellees' privilege against self-incrimination. Appellees are ineligible for benefits because they cannot demonstrate that they have complied with the Selective Service registration criterion, not because they have refused to incriminate themselves. In this civil administrative application process, concluding that appellees have not met their burden of proof or drawing an adverse inference from their assertion of a right to remain silent would not impermissibly burden the exercise of the privilege.

ARGUMENT

I. CONTRARY TO THE DISTRICT COURT'S VIEW, SECTION 1113 REQUIRES CERTIFICATION OF CURRENT DRAFT REGISTRATION STATUS ONLY, AS A GENUINE ELIGIBILITY CRITERION FOR TITLE IV AID.

Section 1113 of the Department of Defense Authorization Act of 1982, Pub. L. No. 97-252, 96 Stat. 748 (to be codified at 50 U.S.C. App. §462(f)) ("Section 1113"), represents a considered congressional decision that, as a matter of federal financial aid policy, limited aid resources should be available only to those students who are willing to meet their responsibilities to their country by registering with the Selective Service System. The statute therefore requires applicants to show that they have registered (or are not legally obliged to register) before receiving federal financial aid. The District Court below misapprehended the purposes, the meaning, and the workings of the statutory scheme.

Section 1113 governs eligibility for grants, loans, and loan guarantees under Title IV of the Higher Education Act of 1965, Pub. L. No. 89-329, 20 U.S.C. §§ 1070-1089 ("Title IV"). Title IV includes a multifaceted scheme of financial aid programs for post-secondary education.

One of the purposes of Section 1113 was to provide a more immediate incentive for students to register with Selective Service. The statute's proponents were concerned by statistics indicating that more than half a million young men had failed to register, many of them deliberately. See, e.g., 128 Cong. Rec. H4758 (daily ed. July 28, 1982) (remarks of Rep. Solomon). The Title IV eligibility requirement would serve as a spur to registration of those who otherwise might intentionally or unintentionally remain unregistered without understanding the

seriousness of their conduct. Id. at H4757.

The statute also furthers several important educational policy objectives. First, as the provision's original sponsors observed, Section 1113 deals with the subject of "rights and responsibilities," a vital issue in educational philosophy. See 128 Cong. Rec. S4943 (daily ed. May 12, 1982) (remarks of Sen. Mattingly).[1] The courts have

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[1] Section 1113 was first introduced by Senators Mattingly and Hayakawa as a floor amendment to the Department of Defense Authorization bill, S. 2248, 96th Cong. 2d Sess., 128 Cong. Rec. S4943 (daily ed. May 12, 1982). The amendment received the endorsement of Senators Tower and Stennis, the ranking majority and minority members of the committee that had reported the bill, and quickly passed. Id. at S4944-45.

After Representative Solomon had introduced a similar bill in the House, the Department of Education drafted a modification incorporating procedural

(footnote continues)

often emphasized that recognition and acceptance of the responsibilities of citizenship is an essential part of the educational process in a democracy. See, e.g., Healy v. James, 408 U.S. 169, 193 (1972); Esteban v. Central Missouri State College, 415 F.2d 1077, 1088-89 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (Blackmun, J.); see Ambach v. Norwick, 441 U.S. 68, 76-77, 80 (1979). Senator Hayakawa also pointed out the fiscal constraints on the government's ability to provide financial aid to all students. 128 Cong. Rec. S4943-44 (daily ed. May 12, 1982); see H.R. Rep. No. 208, 97th Cong., 1st Sess. 730-34 (1981)

(footnote continued)

improvements, which was offered as an amendment by Representative Hartnett. Representative Solomon welcomed the Department's input and endorsed the Hartnett amendment. 128 Cong. Rec. H4763-64, H4766 (daily ed. July 28, 1982) (remarks of Reps. Hartnett and Solomon).

(detailing fiscal 1982 cuts). To make these scarce funds equally available to students who were refusing to register would not be fair to the vast majority who had been willing to expose themselves to the risk of a draft.[2]

To accomplish all these goals, Congress designed a statute that would encourage registration both by future classes of eighteen-year-olds and by students who had already let their registration deadlines pass. Those who had lost their eligibility for financial aid by failing to register could regain

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[2] In fact, as the legislative history stresses, registration does not entail definite exposure to a future draft; issues of classification (particularly as a conscientious objector) remain open for later determination. See, e.g., 128 Cong. Rec. H4761 (daily ed. July 28, 1982) (remarks of Rep. Stratton).

that eligibility by finally registering. Representative Solomon stated:

> Back in February, on February 1, when President Reagan offered a 30-day grace period to many of these young men, hundreds of thousands of young men took advantage of that. And I just think this is going to be an additional encouragement.

128 Cong. Rec. H4758 (daily ed. July 28, 1982). Similarly, Senator Stennis observed that the nonregistered student

> still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible so far as this prohibition or restriction is concerned.

128 Cong. Rec. S4945 (daily ed. May 12, 1982). See also 128 Cong. Rec. H4757 (remarks of Rep. Whitehurst); id. at H4764 (remarks of Rep. Hartnett); id. at H4769 (remarks of Rep. Montgomery) ("they are not eligible until they register and

he has even included that if they do register then they would be eligible").

The statute itself provides that any person to whom the Secretary of Education proposes to deny assistance or benefits shall be given an opportunity

> to provide the Secretary with information and materials establishing that he has complied with the registration requirement under Section 3 [50 U.S.C. App. § 453].

50 U.S.C. App. § 462(f)(4). Accordingly, the Secretary's regulations require only that applicants certify that they are currently registered with Selective Service or that they are not legally obliged to register. See 48 Fed. Reg. 15578, 15582, 15583 (1983) (to be codified at 34 C.F.R. §§ 668.25, 668.27). The regulations do not inquire into past periods of noncompliance. As the regulatory preamble explains,

> consistent with the statutory intent to encourage registration, under these regulations any nonregistrant who was required to register but did not may still qualify for aid in the future payment periods if he registers with Selective Service and complies with the statement and verification requirements.

Id. at 15580.

Notwithstanding the statutory language and the legislative history, the District Court rejected these regulations as void and incompatible with the statute. The District Court insisted that the statute imposed permanent disqualification from Title IV aid on any student who had not registered within 30 days of his eighteenth birthday. Appendix to Appellants' Jurisdictional Statement [hereinafter App.] at 33a-34a. The District Court's construction of the statute was erroneous for at least four separate reasons.

First, the language on which the District Court relied does not support its interpretation. That language states only that:

> Any person who is required under section 3 [50 U.S.C. App. § 453] to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under Title IV of the Higher Education Act of 1965.

50 U.S.C. App. § 462(f)(1). The reference to proclamations, rules and regulations merely recognizes the fact that Section 3 by its own force imposes no obligation to register; it is only when proclamations, rules and regulations are promulgated that the obligation arises. See 50 U.S.C. App. § 453; Rotsker v.

Goldberg, 453 U.S. 57, 60-62 (1981); United States v. Wayte, 710 F.2d 1385, 1388 (9th Cir. 1983). The District Court, however, interpreted this language as rendering permanently ineligible every student who fails, even temporarily, to comply in full detail with any regulations issued under Section 3. Even if this were a plausible reading, it would be at most one among a number of possible constructions, and it is a construction that finds no support in either the legislative history or the views of the administering agency.[3]

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[3] Appellees' championing of this strained interpretation is understandable, since they are seeking technical reasons for judicial interference with a policy judgment they dislike. Why the District Court accepted their argument is less clear; that Court's cursory treatment of the question and its failure to address the relevant bases of interpretation leave few clues for reconstructing its reasoning.

Both the legislative history and the legislative purpose reinforce the Secretary of Education's interpretation of the statute in his regulations. As described above, the chief proponents of the bill expressly stated their intention to encourage students who had already flouted the registration requirement to present themselves for registration. Indeed, the Selective Service laws speak of registration as a duty that continues beyond the initial 30-day period, 50 U.S.C. App. § 462(d), and the Selective Service regulations themselves provide that "[t]he Director of Selective Service shall also arrange for and supervise the registration of those persons who present themselves for registration at times other than on the days fixed for any registration," 32 C.F.R. § 1615.2 (1982).

The District Court's harsh and unforgiving interpretation of the statute would thwart the explicit legislative purpose of encouraging nonregistrants to accept their responsibility. Frustration of expressed legislative intent is hardly the purpose of statutory interpretation.

Furthermore, the interpretation of the statute favored by the Secretary of Education is entitled to particular deference in this case, since he took a major role in its drafting. See note 1 supra. "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." Miller v. Youakim, 440 U.S. 125, 144 (1979). The Secretary's interpretation was also promulgated pursuant to express statutory authority to "issue regulations to implement the requirements of this subsection." 50 U.S.C. App.

§ 462(f)(4). Interpretations adopted pursuant to such authority always command particular attention.

Finally, the District Court's rejection of the Secretary's firmly grounded interpretation is strikingly inconsistent with the rule that an act of Congress should "be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality." St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981). The District Court apparently regarded the permanent disqualification of late registrants as crucial to its holding that the statute created a bill of attainder. App. at 12a, 34a. Yet the District Court adopted precisely the interpretation that a cardinal rule of constitutional adjudication required it to reject.

Thus, the District Court clearly erred in rejecting the interpretation of Section 1113 implemented by the Secretary of Education in his regulations. The statute requires only that the student have registered with Selective Service by the time he signs the certification form in order to be eligible for Title IV aid.

II. SECTION 1113 DOES NOT POSSESS ANY OF THE CHARACTERISTICS OF A BILL OF ATTAINDER

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without the protections of a judicial trial." Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977). These three elements -- specificity, legislative "trial" of the affected class, and imposition of punishment -- must all be present before a statute will

constitute a bill of attainder. Since Section 1113 imposes an eligibility criterion for receipt of a federal benefit, framed in terms of generally applicable standards of conduct, it possesses none of these defining characteristics.

This Court has explained the Bill of Attainder Clause of Article I, § 9 "as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." United States v. Brown, 381 U.S. 437, 442 (1965).

> By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rulemaking. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem

> to be the duty of other departments." Fletcher v. Peck, 6 Cranch 87, 136.

Id. at 446; see generally Note, The Bounds Of Legislative Specification: A Suggested Approach To The Bill Of Attainder Clause, 72 Yale L.J. 330, 343-48 (1962).

The properties that characterize bills of attainder derive from this purpose of confining the legislature to its proper sphere. The first and most basic element of a bill of attainder is its specificity. The statute invalidated by this Court in United States v. Lovett, 328 U.S. 303 (1946), singled out three government employees by name for punishment. See id. at 305 n.1. The only other statute that this Court has identified as a bill of attainder in this century singled out the Communist Party by name from among all similar organizations, and

imposed a permanent disqualification on Party members regardless of any future changes in the nature or conduct of that Party. United States v. Brown, 381 U.S. 437, 450-51 (1965).

Improper specificity may be present in a statute if "the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 86 (1961). Thus, in a pair of Nineteenth Century cases, this Court invalidated as bills of attainder disabilities imposed in 1865 on those who had performed certain arguably disloyal but not unlawful acts during the Civil War. Ex parte Garland, 71 U.S. (4 Wall.) 333, 377 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318 (1867); see also

Pierce v. Carskadon, 87 U.S. (16 Wall.) 234 (1872) (per curiam).

In contrast, this Court has repeatedly emphasized that legislation assigning consequences to generally designated present or future activities does not constitute a bill of attainder. United States v. Brown, 381 U.S. 437, 450-52 (1965); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 86-88 (1961). To view legislative classifications based upon present or future conduct as raising attainder questions would convert the Bill of Attainder Clause from a guarantee of the separation of powers into a vehicle for judicial second-guessing of broad legislative policy decisions. "However expansive the prohibition against bills of attainder, it surely was not intended

to serve as a variant of equal protection doctrine." Nixon v. Administrator of General Services, 433 U.S. 425, 471 (1977).

The second element, legislative "trial," is present only when Congress purports to determine that particular individuals or groups have certain undesirable attributes. "[A] legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics." United States v. Brown, 381 U.S. 437, 454 n.29 (1965).

The final defining element, imposition of "punishment," was analyzed at length by this Court in Nixon v. Administrator of General Services, 433 U.S. 425

(1977). There, the Court identified three factors useful in determining whether unfavorable treatment should be deemed punishment for bill of attainder purposes. First, the Court looked to a historical list of sanctions: imprisonment, banishment, confiscation of property, and barring attainted individuals from employment. Id. at 474-75. Second, the Court applied a functional test, asking whether the law "reasonably can be said to further nonpunitive legislative purposes." Id. at 475-76. Third, the Court looked to the legislative record for evidence of a "congressional intent to punish." Id. at 478.

As is demonstrated below, Section 1113 suffers from none of the vices that characterize a bill of attainder or that prompted the constitutional prohibition.

A. Section 1113 Lacks The "Specificity" Of A Bill Of Attainder.

The District Court below held that Section 1113 was impermissibly specific because it singled out the class of persons who have committed "the past act of nonregistration." App. at 12a, 34a. This holding was predicated on the District Court's erroneous interpretation of Section 1113 as placing an irremovable stigma on any student who had not registered within thirty days of his eighteenth birthday, a stigma rendering him permanently ineligible for Title IV aid even if he registered subsequently. If the District Court erred in its interpretations, as argued supra, this holding must also fall. Even if the interpretation were correct, however, the District Court's analysis is insupportable under

this Court's precedents on bills of attainder.

Under the District Court's interpretation of Section 1113, the statute would single out for Title IV ineligibility all persons who have failed in the past or will fail in the future to register for Selective Service within the time limits prescribed by Presidential Proclamation No. 4771. A few of these individuals may already be identifiable, and many more could be identified with sufficient effort, but the major thrust of the statute is directed towards the indeterminable mass of unknown persons who will fail to register in the future. By the time they enter the restricted class, their conduct will have become "past acts," but only in the sense in which every prospective regulatory statute is

enforced exclusively against persons who have already committed a violation. This is not the kind of past conduct that serves to describe specific individuals. If the fact that some of the affected students had already failed to register before the statute was passed could make Section 1113 a bill of attainder, then every statute with some retrospective effect would be a bill of attainder. As this Court observed in the Communist Party case, "whatever the source from which the legislative experience and instruction derived, the Act applies to a class of activity only, not to [appellees] as such. Nothing in this offends the constitutional prohibition of attainder." 367 U.S. at 88.

The District Court's error is made clearer, of course, by its reliance on a mistaken construction of the statute.

The ineligibility for Title IV funds is not triggered by past acts in any sense, because it is the student's current failure to rectify his status by registering that precludes his receipt of financial aid. As Senator Stennis observed, though the student has not yet registered, "he still has complete control of the situation." 128 Cong. Rec. S4945 (daily ed. May 12, 1982).[4]

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[4] In dismissing the Government's argument on this point, the District Court stated, "To say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement." App. at 12a. In enunciating this non sequitur, the court unaccountably overlooked the fact that appellees' intentional failure to register is the continuation of a criminal act, and a course of conduct in which they have no right to persist. Even students who have unintentionally failed to register are legally obliged to correct that oversight once they recognize it. The present case is thus totally distinguishable from Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), in which persons who had committed acts considered lawful in the past could avoid disqualification only by swearing a false oath.

The individuals disqualified by Section 1113 are not "described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons," Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 86 (1961) -- indeed, they are not described in terms of past conduct at all. Rather, the statute sets out "general and prospectively operative standards of qualifications and eligibility," inoffensive to the Bill of Attainder Clause. Garner v. Board of Public Works, 341 U.S. 716, 723 (1951).

This Court's observations on "escapability" in United States v. Brown, 381 U.S. 437, 457 n.32 (1965), similarly confirm that Section 1113 is not a bill of attainder. Historically some bills of attainder, passed against

named or described persons and groups, offered them the opportunity to avoid attaint by surrendering, or by remaining in exile. See Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1867) (describing attaint of the Earl of Clarendon); Note, supra, 72 Yale L.J. 330, 339-40 (1962). "Escapability," therefore, does not always prevent a statute from constituting a bill of attainder, where the statute is directed against a specific person or group (e.g., the Communist Party). 381 U.S. at 457 n.32. But where every individual can extricate himself from the affected class at will because the statute is defined in terms of general standards of present conduct, no "specific" group is involved.

Thus, Section 1113 lacks even the most fundamental characteristic of a bill of attainder, the singling out of individuals or specific groups.

B. Section 1113 Does Not Embody An Explicit Or Implied Legislative Adjudication Of Guilt.

When Congress acted to limit Title IV aid to students who had complied with any duty to register with Selective Service, it did not purport to decide the guilt of individuals or to make any other adjudication. The statute sets up an administrative procedure for determining which applicants are eligible. 50 U.S.C. App. §462(f)(4). The only determinations made by Congress are (1) the tautological judgment that those who remain unregistered have not yet complied with their duty to register, and (2) the broad policy decision not to provide federal financial aid for any student until he discharges any duty to register. These are not the kind of particularistic, empirical judgments reserved for judge

and jury. Indeed, this Court has repeatedly emphasized that such policy judgments concerning categories of aid recipients are beyond the province of the courts. See, e.g., Schweiker v. Hogan, 457 U.S. 569, 593 (1982); Schweiker v. Wilson, 450 U.S. 221, 238 (1981); Harris v. McRae, 448 U.S. 297, 326 (1980); Mathews v. Diaz, 426 U.S. 67, 84 (1976); Flemming v. Nestor, 363 U.S. 603, 616 (1960).

The District Court relied upon its impression that Section 1113 legislatively determines guilt by "assum[ing] that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements." App. at 12a. This impression has no basis in the statute, the regulations, or the legislative history. Aside from cases of total refusal to

cooperate with the administration of the statute, a student's failure to certify his registration indicates, at most, awareness that he has not yet registered. The statute is designed to encourage any unregistered student, regardless of the circumstances of his original failure to register, to come forward and discharge any legal duty to register with Selective Service. Senator Stennis expressly voiced his concern for the position of the unintentional non-registrant, and his satisfaction that the statute would not affect any student who was willing to rectify his status. 128 Cong. Rec. S4945 (daily ed. May 12, 1982). The fact that financial aid is withheld until the student does register reflects no assumption whatever about any person's mental state, except an assumption that he is in need of further

incentive to register. Nor does the statute adjudicate the guilt of any person or group.

C. Section 1113 Does Not Inflict Punishment.

Finally, the statute does not inflict punishment within the meaning of the Bill of Attainder Clause. This is especially obvious if the interpretation of Section 1113 implemented in the regulations is correct, but remains true even under the District Court's erroneous interpretation of the statute. Each of the three factors identified in Nixon v. Administrator of General Services, 433 U.S. 425 (1977) -- historical precedent, existence of nonpunitive legislative purposes, and tenor of the legislative record -- indicates that Section 1113 is a nonpunitive regulatory measure.

As the District Court itself recognized, "denial of federal financial aid is not a historical punishment." App. at 14a. There is no historical precedent for regarding a denial of government benefits as a bill of attainder; indeed, this Court has expressly held to the contrary. Flemming v. Nestor, 363 U.S. 603, 616-17 (1960). Thus Section 1113 lacks the first of the characteristics identified in Nixon.

Section 1113 serves numerous legitimate and nonpunitive regulatory purposes. In the sphere of educational benefit policy, the statute reinforces the fundamental linkage between privileges and responsibilities, and reserves limited aid resources for those students who have fulfilled their obligation to take a preliminary step that might ultimately contribute to the defense of

their country. This Court has long paid particular deference to legislative action conferring compensating privileges on those who accept the sacrifices that military service entails, see Regan v. Taxation With Representation of Washington, 103 S. Ct. 1997, 2003-04 (1983), especially in the field of education, see Johnson v. Robison, 415 U.S. 361 (1974); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

The foregoing nonpunitive purposes are apparent even if one accepts the District Court's peculiar construction of Section 1113.[5] Once the correctness of

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[5] To reconcile its interpretation with a finding of punitive intent, the District Court was forced to postulate congressional vindictiveness towards students whose failure to register was wholly inadvertent, and an implicit adjudication that those students possessed "guilty intent." App. at 16a. There is not even a hint of such an extraordinary attitude in the legislative history.

the administrative interpretation is recognized, however, the statute is revealed as entirely nonpunitive: the only impact of Section 1113 on nonregistered students is to give them further incentive to bring themselves into belated compliance with the registration requirement. After the nonregistrant has rectified his status, the statute has no further effect upon him. This form of encouragement by financial incentive has little in common with the deterrent mode of the criminal law, which normally operates by threatening punishment that the criminal cannot forestall once his misdeed has been performed. Thus, under either interpretation, Section 1113 must be considered nonpunitive under the "functional test." Appellees cannot "establish that the legislature's action constituted punishment and not merely the

legitimate regulation of conduct." Nixon, 433 U.S. at 476 n.40.

Finally, the legislative history offers no support for the charge that Congress was motivated by a desire to punish nonregistrants. The District Court found three references in the floor debates to punishments and penalties, but each of these was made by the opponents of the measure. App. at 17a-18a (quoting remarks of Reps. Edgar and Goldwater and Sen. Durenberger). As this Court has long recognized, the inflated rhetoric of a bill's antagonists is not a reliable guide to the congressional intent behind its passage. See, e.g., NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964); Nixon, 433 U.S. at 479 (rejecting congressional opponent's characterization of statute as bill of attainder).

Furthermore, this Court has never held that a statute serving legitimate regulatory purposes amounted to a bill of attainder merely because a few speakers on the floor of Congress stated that the conduct being regulated was deserving of punishment; rather, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." Flemming v. Nestor, 363 U.S. 603, 617 (1960).

The District Court also relied upon statements by the bill's proponents evidencing their belief that unthinking provision of financial aid to nonregistrants would be unfair to students who had accepted their responsibility to register, and that there was no reason why those who maintained a refusal to register should remain eligible for Title

IV benefits. App. at 18a & n.5. But these opinions as to the appropriateness of limiting a benefits policy do not demonstrate a desire to punish. To the contrary, the bill's proponents made clear that they were not trying to punish nonregistrants, but only to encourage them to register and thereby regain their Title IV eligibility.

As this Court observed in Nixon, 433 U.S. at 481-82, the details of the statute itself may demonstrate the absence of punitive intent. Congressional solicitude for the nonregistered Title IV applicants extended to careful provision of administrative procedures for challenging a denial of financial aid, 50 U.S.C. App. §462(f)(4), as well as the assurance that students could regain Title IV eligibility by regis-

tering. These very features of the statute are highlighted in the legislative history. See H.R. Rep. No. 749, 97th Cong., 2d Sess. 174 (1982); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Jepsen); id. (remarks of Sen. Stennis).

Thus, the eligibility criterion for benefits contained in Section 1113 cannot be characterized as a "punishment." This Court has repeatedly emphasized the profound constitutional difference between government action affirmatively placing obstacles in an individual's path and government failure to remove financial obstacles not of its own creation. See, e.g., Regan v. Taxation with Representation of Washington, 103 S. Ct. 1997, 2003 (1983). The only effect of Section 1113 is to condition federal government

largesse in the form of grants, direct loans and loan guarantees. The statute leaves the student free to seek support for his education from his university, from state government, from other loan services, and from private philanthropy, as well as from family and from his own labors.

Section 1113 displays none of the characteristics necessary for recognition of a bill of attainder. It does not single out a specific individual or group; it does not adjudicate guilt through a legislative "trial"; and the withholding of Title IV aid until the applicant registers with Selective Service constitutes legitimate nonpunitive regulatory legislation.

III. THE PROCEDURES IMPOSED UNDER SECTION 1113 DO NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The District Court held that the procedure by which Section 1113 implements its eligibility requirement compels students to incriminate themselves, in violation of the Fifth Amendment. Not only was the District Court mistaken in perceiving a conflict between the statute and the Fifth Amendment, but it also erred in concluding that such a conflict would require an injunction against implementation of the certification requirement.

The District Court did not explain whether its Fifth Amendment holding was dependent upon or independent of its holding that Section 1113 was a bill of attainder. But once it is recognized that the statute establishes an otherwise valid eligibility requirement for

Title IV aid, appellees' Fifth Amendment arguments become absurd.

A. Appellees Are Not Being Compelled To Incriminate Themselves.

The procedure at issue provides that, when accepting an offer of Title IV assistance, recipients must certify either that they are not legally obliged to register with Selective Service, or that they have already done so. The form gives the recipient no opportunity to assert that he is not registered or that he registered late.[6] This is no accident

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[6] The suggested certification form is set out in the regulations, 48 Fed. Reg. 15578, 15582 (1983) (to be codified at 34 C.F.R. § 668.25). It reads:

> I certify that I will use any money I receive under the Title IV student financial aid programs only for expenses related to attendance at [insert name of school] ____; and [check as appropriate]

(footnote continues)

-- Congress was aware that asking non-registrants to identify themselves as such might raise Fifth Amendment questions, and deliberately chose not to do so. See 128 Cong. Rec. H4762 (daily ed. July 28, 1982) (remarks of Rep. Stratton).

Congress has made no attempt to elicit incriminating responses. Nonregistrants are categorically ineligible for Title IV aid; they are not required or

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(footnote continued)

___ I certify that I am not required to be registered with Selective Service because:
___ I am a female.
___ I am in the armed services on active duty (Note: Members of the Reserves and National Guard are not considered on active duty)
___ I have not reached my 18th birthday.
___ I was born before 1960.
___ I am a permanent resident of the Trust Territory of the Pacific Islands or the Northern Mariana Islands.
___ I certify that I am registered with Selective Service.

encouraged to apply, and Congress has not asked them to identify themselves on the certification form. A conscious nonregistrant who insists on applying can respond to the form only by failing to return it, by leaving it blank, by perjuring himself, or by writing in a response not available on the form. But whatever course he chooses, his conduct is entirely voluntary. A nonregistrant has nothing to gain by applying, and his actions are not "compelled."

The District Court relied on three fallacious arguments in characterizing the conduct of an applicant for Title IV aid as "compelled." First, it drew a confused analogy with Marchetti v. United States, 390 U.S. 39 (1968), in which this Court held that mandatory filing requirements directed at gamblers

were not rendered noncompulsory by the fact that the individuals could give up gambling. See App. at 25a. But the only consequence of that holding in the present situation would be a determination that mandatory reporting of nonregistered status would not be made voluntary by the fact that the individual could always register, not that voluntary submission of a preprinted form with allegedly incriminating responses is "compelled." Second, the District Court insisted that nonregistrants were compelled to answer because they were given a choice "between the rock and the whirlpool." See App. at 25a. In fact, however, nonregistrants are given no such choice at all. Since they are ineligible for aid and cannot hope to pass themselves off as eligible, they

sacrifice nothing if they refrain from applying. There is no causal relationship between the withholding of aid and the nonregistrant's decision to make a futile application. Third and finally, the District Court misconstrued this Court's line of cases dealing with "penalties" on the exercise of the privilege, App. at 26a; that error is addressed more extensively in the section immediately following.

B. Section 1113 Does Not "Penalize" Any Purported Exercise Of The Fifth Amendment Privilege.

The District Court also indicated that Section 1113 imposed an impermissible "penalty" on the exercise of the Fifth Amendment privilege. App. at 26a. But even if it were assumed that a student's refusal to complete the certification form could constitute an

exercise of the privilege, this Court's precedents demonstrate that denying the student Title IV aid would not "penalize" protected conduct.

The Fifth Amendment does not require the government to shield individuals from all adverse consequences that may flow from their reliance upon the privilege against self-incrimination. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 236 (1980); Barnes v. United States, 412 U.S. 837, 846 (1973). This Court has long held that, the privilege notwithstanding, the state is free to withhold employment and other benefits from a person who refuses to supply information necessary to demonstrate his entitlement to continue receiving those benefits. Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Gardner v. Broderick, 392 U.S. 273, 278 (1968); Kimm v. Rosenberg,

363 U.S. 405 (1960); Orloff v. Willoughby, 345 U.S. 83 (1953). "[T]estimony to secure a benefit from the Government is not ipso facto 'compelled' within the meaning of the Self-Incrimination Clause." McGautha v. California, 402 U.S. 183, 212 (1971). In Orloff, the petitioner had been conscripted under the Doctor's Draft Act and had then applied for a commission as a medical officer, but asserted the Fifth Amendment privilege in response to certain questions concerning his qualifications. This Court observed:

> No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a position of honor and trust. We have no hesitation in answering that question "No."

345 U.S. at 91.

These precedents illustrate the limited effect of the Fifth Amendment privilege on determination of entitlement to benefits. Application for government benefits is a form of civil administrative proceeding. Although the privilege against self-incrimination may be asserted in such proceedings, the tribunal is free to draw reasonable inferences, consistent with the other evidence, from its assertion. Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976). This is even true where the individual is the respondent in an administrative proceeding initiated against his will by the government. Id. A fortiori, when the individual voluntarily initiates the proceeding in order to gain an advantage for himself, the tribunal may deny his claim if his privileged silence prevents him from presenting

sufficient evidence of his entitlement.[7] The importance of educational benefits in particular, emphasized by the District Court, does not affect this governing rule of law. Even if the benefit were so important that the applicant should be treated as if he were an involuntary participant in the proceedings, under Palmigiano the Secretary would still be permitted to draw an adverse inference from his silence.

These principles demonstrate that the Secretary of Education may deny Title IV aid to applicants who do not certify

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[7] See, e.g., Blumenthal v. F.C.C., 318 F.2d 276 (D.C. Cir.), cert. denied, 373 U.S. 951 (1963); Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 227 (D. Kan. 1979); 4 Moore's Federal Practice § 26.60[6] at 26-252; 8 C. Wright & A. Miller, Federal Practice & Procedure § 2018 at 149; cf. In re Sterling-Harris Ford, Inc., 315 F.2d 277 (7th Cir.), cert. denied, 375 U.S. 814 (1963); Sahn v. Pagano, 302 F.2d 629 (2d Cir.), cert. denied, 371 U.S. 819 (1962).

their registration, without exerting a compulsion offensive to the privilege against self-incrimination. Appellees assert a fear that they might be incriminated by their own actions because they are legally obliged to have registered but cannot truthfully certify that they have done so. If they fail to complete or submit the registration certification form, they have failed to demonstrate that they satisfy one of the necessary eligibility criteria for Title IV aid: the Selective Service registration requirement. Appellees do not suggest that they should be granted aid on the basis of other evidence of their registration, because in fact they have not registered. Given the total absence of evidence on a criterion for eligibility, the Secretary of Education would be equally justified either in denying

their applications for failure to carry the burden of proof, or in inferring that they are indeed ineligible. See Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165-66 (1971); Konigsberg v. State Bar of California, 366 U.S. 36, 46 (1961); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). In either case he may properly deny them Title IV assistance. Placing the burden of proof of eligibility upon the aid applicants, "as is the case when applying for most governmental benefits," creates no constitutional problem. Lavine v. Milne, 424 U.S. 577, 582, 585 (1976).

C. Acceptance of Appelles' Fifth Amendment Claim Would Not Justify The District Court's Injunction.

Even if the District Court had not erred in concluding that the Secretary's

procedures for implementing Section 1113 violated respondents' Fifth Amendment privileges, the District Court's decision to enjoin all enforcement of Section 1113 would still be unjustified. This Court's precedents teach that testimony improperly compelled by administrators in violation of the privilege against self-incrimination acquires a de facto immunity, and cannot be used against the individual in subsequent criminal proceedings. Garrity v. New Jersey, 385 U.S. 493 (1967). So long as the government does not attempt to coerce the individual to waive this immunity, it can lawfully impose sanctions for his refusal to provide relevant information. Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Gardner v. Broderick, 392 U.S. 273, 278 (1968). No attempt has been made in the implementation of

Section 1113 to require applicants to waive any possible immunity from use of their responses. Enjoining the implementation of the statute is therefore too broad a remedy for any hypothesized self-incrimination problem. Appellees cannot be entitled both to receive financial aid and to remain silent about their registration status. Rather, the maximum possible relief would be de facto use immunity.

To the extent that this Court had a remedial choice between granting use immunity while denying financial aid, and awarding financial aid while requiring applicants to make unimmunized responses to the certification form, the legislative history of Section 1113 would demonstrate that the former option would be the one most consistent with the legislative purpose. Congress was

primarily interested in providing financial incentives for registration, not in using the Title IV application process for investigative purposes. See Leary v. United States, 395 U.S. 6, 26-27 (1969).

Thus, neither the Bill of Attainder Clause nor the Fifth Amendment provides any basis for enjoining the implementation of Section 1113. Until appellees accept their responsibility and register with Selective Service, they are ineligible for Title IV aid. The Secretary of Education does not interfere with any of their constitutional rights by denying them that aid until they demonstrate that they have registered.

CONCLUSION

Appellees' distaste for the policy choice made by Congress in passing Section 1113 is evident. They insist that their "right" to receive federal aid to advance their education overshadows

all of the public interests that prompted Congress to adopt the statute. But the Bill of Attainder and Self-Incrimination Clauses do not authorize judicial revision of such broad legislative policy choices. Section 1113 does not implicate the more specific concerns addressed by those important provisions.

For the reasons stated above, the judgment of the District Court should be reversed.

Respectfully submitted,

PETER B. ELLIS*
GERALD L. NEUMAN
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

Attorneys for Amicus Curiae

Of Counsel:

WILLIAM BURNETT HARVEY
General Counsel
Boston University
141 Bay State Road
Boston, Massachusetts 02215
(617) 353-2326

* Counsel of Record

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No. 83-276

IN THE

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OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, et al.,
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v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, et al.,
Appellees.

SELECTIVE SERVICE SYSTEM, et al.,
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v.

BRADLEY BOE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

AMICUS BRIEF OF THE UNIVERSITY OF MINNESOTA, MACALESTER COLLEGE, MACALESTER COLLEGE COMMUNITY COUNCIL, WAYNE STATE UNIVERSITY, UNIVERSITY OF MICHIGAN, PACIFIC SCHOOL OF RELIGION, VASSAR COLLEGE IN SUPPORT OF APPELLEES

PATRICIA EAMES
Vice President and
General Counsel
Wayne State University
380 Mackenzie Hall
Detroit, MI 48202
(313) 577-2268

JAMES D. MILLER
Attorney for Macalester
College Community Council
2850 Metro Drive, Suite 800
Minneapolis, MN 55420

STEPHEN S. DUNHAM
WILLIAM P. DONOHUE
University of Minnesota
321 Morrill Hall
100 Church Street S.E.
Minneapolis, MN 55455
(612) 373-3446

RODERICK K. DAANE
General Counsel
University of Michigan
4020 Fleming Building
Ann Arbor, MI 48109

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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INTERESTS OF THE AMICI CURIAE

All of the amici are respected institutions of higher education in the United States. These schools provide higher education opportunities to thousands of students each year and, through their graduates, provide a continuing supply of well trained and broadly educated citizens.

At each of these schools, a large number of the students receive financial assistance under Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.* Title IV creates the largest and most comprehensive financial aid program available for higher education. Its continuation, without restriction, is vital to the education of minorities and the needy in the United States. Each of the institutions is responsible for disbursing and administering aid under Title IV in accordance with law and regulation.

In amici's view, Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, which requires proof of draft registration as a precondition for financial assistance, substantially impairs the Title IV programs. This condition is wholly unrelated to the purposes of financial aid, and it substitutes the colleges' and universities' financial aid offices for the criminal justice system. As noted on the floor of the House, Section 1113 has "deputized" America's colleges and universities to enforce the draft registration requirement through the financial aid process. Remarks of Representative Schroeder, 128 Cong. Rec. H4762 (July 28, 1982).

It is as inappropriate to enforce the draft laws through Title IV aid as it would be inappropriate to enforce the tax laws or other criminal laws by withholding Title IV aid. See remarks of Congressman Peyser, 128 Cong. Rec. H4768 (July

28, 1982). It is not the business or purpose of colleges and universities or of Title IV to serve as the enforcement mechanism for the criminal laws. Institutions of higher education must be protected from such governmental intrusions which entangle them in governmental enforcement and divert large amounts of their resources to such purposes.

Amici take no issue with the underlying requirement of draft registration, which is currently enforced through criminal penalties. Amici believe, however, that, as found by the District Court, the requirements of Section 1113 are unconstitutional.

The individual amici are:

University of Minnesota

The University of Minnesota, which serves over 57,000 students on five campuses, is the largest public institution of higher education in the State of Minnesota. Its Twin Cities campus is the largest single campus in the United States. Each year, approximately $55,000,000 in financial aid subject to Title IV of the Higher Education Act and now Section 1113 is distributed to about 20,000 students.

Macalester College and
Macalester College Community Council

Macalester College is a private liberal arts college located in St. Paul, Minnesota, serving over 1,500 students from 49 states. In 1982-83, Macalester distributed over $1.5 million in financial aid under Title IV. Affidavit of Matthew Entenza, President, Macalester Community Council, at para. 3. The Macalester College Community Council is a body of students, professors and community members responsible for governance of the College.

Wayne State University

Wayne State University is a major public university—one of the three constitutionally autonomous universities provided for by the Michigan constitution. It is located in Detroit and serves a predominantly urban student population of 32,000, 53% of whom receive financial aid. Each year approximately twenty-one million dollars in financial aid subject to Title IV of the Higher Education Act, and now to Section 1113, is distributed to about 15,000 students.

University of Michigan

The University of Michigan is the oldest public institution of higher education in the state, having been established in 1817, before Michigan became a state. It is one of three major constitutionally autonomous universities established by 63 Mich. Const., Art. 8, § 5. The University's main campus is located in Ann Arbor, Michigan, and it has branch campuses in Flint, Michigan, and Dearborn, Michigan. The student population is approximately 40,000, of which roughly 50% are enrolled in professional degree programs or other graduate degree programs. Approximately 60% of the University's students receive financial aid. Each year approximately $45,000,000 in financial aid, subject to Title IV of the Higher Education Act and to Section 1113, is distributed to approximately 20,000 students.

The University of Michigan joins in this brief for the sole purpose of separately stating its overriding disapproval, as a matter of sound public policy, of two results produced by Section 1113: (a) the involuntary deputization of the University as enforcer of federal criminal law, and (b) the imposition upon the University of a significant annual administrative burden.

Pacific School of Religion

Pacific School of Religion is the oldest theological school in the West founded in 1866. It is a small private graduate school dedicated to the preparation of persons for the ministry of the church and ministry to the world. The institution is located in Berkeley, California and is primarily committed to preparing persons for the ordained leadership of various denominations. There are over 225 students enrolled in the school, representing at least 30 denominations. There are 180 full-time equivalent students. Each year approximately $115,000 of financial aid subject to Title IV of the Higher Education Act, and now Section 1113, is distributed to between 75 and 100 of our students.

Vassar College

Vassar College is a private liberal arts college located in Poughkeepsie, New York. It enrolls over 2200 students, approximately 40% of whom are male. In 1983-84, approximately $3,330,000 in financial aid under Title IV will be distributed to approximately 50% of Vassar's student body.

STATEMENT OF THE CASE

Section 1113 provides that a student who fails to register for the draft within 30 days of his eighteenth birthday is ineligible for all forms of assistance under Title IV. Title IV establishes several programs of financial aid for students pursuing higher education. These programs are the primary source of financial aid for higher education in the United States.

Title IV authorizes six major programs of financial assistance to students seeking higher education. These are National Direct Student Loans (NDSL), College Work Study Program (CSW), Supplemental Educational Opportunity Grants (SEOG), Pell Grants, State Student Incentive Grants (SSIG), and Guaranteed Student Loans (GSL). Most of these programs distribute funds based on the need of individual student applicants. Need is the difference between cost of attendance and the amount a student and his/her family is expected to contribute. See e.g. 34 C.F.R. 674.11-.13 (NDSL); 34 C.F.R. 675.9, .11-.13 (CWS) and 34 C.F.R. 676.9, .12-.13 (SEOG).

These programs distribute billions of dollars to millions of students each year. For example, in 1983-84, the Department of Education will distribute one billion dollars to almost two million students for just three of these programs—CWS, SEOG, and NDSL. Department of Education, Office of Post Secondary Education Campus-Based Programs Report No. 84-1, June 1983. And in fiscal year 1980 for all programs over nine billion dollars were disbursed in approximately seven and one-half million awards. Department of Education, Office of Student Financial Asst. Program Book, July, 1981 at 9-10.

Title IV aid goes predominately to students from families with low incomes and, in disproportionately large measure, to members of ethnic minorities. For example, in the Pell (formerly BEOG) and SEOG programs, over 70% of the

recipients are from families with incomes of less than $18,000 per year.[1] *Id.* at 13. For the CWS, NDSL and State Grant Programs, over 65% of all recipients are from families with incomes less than $18,000 per year.[2] *Id.* Further, in academic year 1978-79, 49.5% of all aid recipients in four major programs were minority group members, while in the United States as a whole, based on the 1980 census, only 17% of the population falls into minority categories. *Id.* at 16; Statistical Abstract of the United States.

At the University of Minnesota these programs constitute over 80% of the total financial aid available. Supplemental Affidavit of Robert I. Misenko, para. 3. Similarly high percentages undoubtedly apply for other colleges and universities.

All of the Title IV programs are administered directly by universities and colleges throughout the United States. By the terms of Section 1113 and its implementing regulations, these colleges and universities are now responsible for collecting statements of registration compliance which indicate the applicant's draft registration status and for obtaining verification of those compliance statements. 34 C.F.R. §§ 668.24 and .26. Based on these documents, the colleges and universities are required then either to grant or deny Title IV assistance to students.

The draft registration requirements in Section 1113 are unrelated to the purposes of Title IV and bear no resemblance to the other requirements for financial assistance. Virtually

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[1] The average family income for the entire United States in 1979-80 was $23,177 per year. Provisional Estimates of Social and Economic Housing Characteristics, PHC 80-S1-1, United States Census Bureau.

[2] Summary statistics for all programs indicate that 52% of all recipients come from families with incomes less than $18,000 per year. An additional 34.5% of all recipients are either independent or unknown, leaving only 12.4% from families with incomes in excess of $18,000 per year. *Id.*

all of the program requirements relate to the need of the individual, their enrollment in institutions of higher education, and the use of the funds for educational purposes. See, *e.g.*, 20 U.S.C. § 1091, 34 C.F.R. 674.11-.13, 34 C.F.R. 675.9, .11-.13, and 34 C.F.R. 676.9, .12-.13. In their unwanted role as enforcers, the colleges and universities are required to deny financial assistance to certain students which effectively denies them access to higher education.

At this point in history, higher education is a virtual prerequisite to successful advancement in most careers. In the professions of law, medicine and dentistry, for example, successful completion of degree requirements is an almost universally required credential for licensure. In virtually all areas of commerce, industry and the arts, individuals are assessed and allowed access to many positions of importance based on the extent of their higher education.

Those who obtain higher education degrees not only earn more money and have access to more jobs, but they are also personally improved and broadened by their exposure to higher education. See, Howard R. Bowen, Investment in Learning (1977) and National Commission on Excellence in Education, A Nation at Risk (1983). If the purposes of higher education are fulfilled, the students' lives are made more full and society as a whole is improved. *Id.* As noted by the National Commission on Excellence in Education, providing financial assistance for this higher education is a clear responsibility of Federal Government. *Id.* at 33.

Amici do not believe it is appropriate for them to deny anyone the access to higher education where, as here, that denial is based on grounds that have no relationship to higher education or to the purposes of financial aid. Amici object in particular to being deputized as enforcers of what they believe to be an unconstitutional statute.

SUMMARY OF ARGUMENT

I. Section 1113 is a Bill of Attainder. It legislatively identifies a group of individuals, those who have not registered for the draft, determines their guilt, and imposes punishment upon them.

By its own terms Section 1113, without benefit of judicial trial, makes ineligible for financial assistance the politically unpopular group of all individuals who are required to register for the draft and have not done so in accordance with the law. The punishment imposed on this group is denial of financial aid and the ability to pursue various careers through higher education. Since failure to register is a crime, in many instances a double penalty is imposed on this group. The legislative history demonstrates that the proponents were aware of and intended these punitive effects.

II. Section 1113 requires students to incriminate themselves in violation of the Fifth Amendment by furnishing a certificate of compliance with the registration laws as a precondition for financial aid. The information sought is clearly incriminating and is compelled by the denial of financial aid if the information is not provided. This penalty is, in effect, a denial of higher education and an excessive burden on the exercise of the Fifth Amendment privilege.

III. Section 1113 creates distinctions based on gender and wealth that have no relationship to legitimate governmental purposes. Section 1113 only applies to men, which is permissible for the purpose of the draft, but has no place in the distribution of financial aid. Moreover, Section 1113 enforces the Selective Service Act only against recipients of Title IV aid, who are primarily poor and disproportionately from minority groups. There can be no legitimate governmental purpose for targeting poor and minority students for enforcement when all individuals are required to register.

ARGUMENT

I. SECTION 1113 IMPOSES PUNISHMENT ON MALE EIGHTEEN YEAR OLD NON-REGISTRANTS WITHOUT THE BENEFIT OF A TRIAL AND IS THEREFORE A BILL OF ATTAINDER.

The Constitution prohibits the enactment by Congress of bills of attainder in Article 1, Section 9, Clause 3: "No Bill of Attainder or ex post facto Law shall be passed." This prohibition is one of the few express limitations on congressional action contained in the original constitution. It was considered so important to a fair and ordered government that it was passed unanimously and without debate by the constitutional convention. *United States v. Brown*, 381 U.S. 437, 441 n.6 (1968).

The clause is intended to prohibit legislative punishment of an individual or specific groups of people. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The Bill of Attainder clause has been utilized primarily in cases such as the one before the court in which an over-zealous Congress seeks to strike out at groups it perceives as disloyal.

The Court has adapted the concept of attainment in accordance with its purposes to include modern day forms of punishment or of group identification which were unknown at the time of the framing of the Constitution. As the Court indicated in *Brown*, 381 U.S. at 442, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." In essence, the Bill of Attainder Clause prohibits the Congress from usurping judicial power and imposing sanctions on groups or individuals which it disfavors.

Viewed in this broad context, Section 1113 is a Bill of Attainder. Its first section, Section 1113(f)(1), makes ineligible for federal financial aid those who failed to register in accordance with 50 U.S.C. App. (& Supp. V) 453. This same conduct is already subject to criminal sanction under 50 U.S.C. App. (& Supp. V) 462, but only after a full criminal trial.

The contrast could not be more stark. The same conduct is subject to two different penalties. The only difference is that in one case the violation is determined by the courts and in the other the violation has already been determined by Congress. Plainly the law usurps the judicial function and imposes the penalty without trial. The reluctant administrators of this illegal scheme are the colleges and universities of this country which are required to seek the statements of registration compliance and verification and impose the penalty implicit in the denial of financial aid.

Section 1113 thus contains all three elements of an unconstitutional Bill of Attainder. First, the statute determines the guilt of an identifiable group. *United States v. Brown*, 381 U.S. at 445, 447. Second, the statute inflicts punishment. *Nixon v. Administrator of General Services*, 433 U.S. at 468. Third, the statute imposes that punishment without the protection of a judicial trial. *Id.*

A. Section 1113 identifies a specific group of individuals who have not registered for the draft.

As the District Court found, the statute legislatively identifies a group of individuals, *i.e.*, "young male students who require financial aid but cannot complete truthful statements of compliance." Jurisdictional Statement, Appendix A at 10a (hereafter J.S. App.). This group is comparable to those

identified in other legislation which this Court has found to be unconstitutional Bills of Attainder.

For example, in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), and *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867), the Court struck down loyalty oaths required of ministers and attorneys, respectively. Similarly, in *United States v. Brown*, 381 U.S. 437 (1965), the identified group was all Communist Party members. The group isolated by Section 1113—students who have applied for financial aid but cannot truthfully complete a statement of compliance—is smaller and more easily identified than any of the groups in *Cummings*, *Ex Parte Garland*, or *Brown*.

Further, as in *Cummings* where the loyalty oath bore no relationship to the profession, the requirements of Section 1113 bear no relationship to the purposes of financial aid. Just as the loyalty oath was designed "to reach the person not the calling", 71 U.S. at 320, Section 1113 is designed to reach the specific group of individuals who have not registered for the draft and to distinguish them from all others who have applied for financial aid.

The Government argues that the group identification requirement is not met because individuals can simply register and therefore make themselves eligible for financial aid. Appellants' Brief at 15. This argument is based on the regulatory scheme adopted by the Secretary of Education, which allows non-registrants to register at any time, whether or not in compliance with the registration requirement, and thereby to qualify for aid for purposes of Section 1113. 34 C.F.R. 668.27(b). In its Brief, the Government is careful to note that those subject to the registration requirement are *not* "free for all purposes to register whenever they please." Appellants' Brief at 17 n.7. Failure to register within the 30-day period remains a crime subject to prosecution. *Id.*

As noted by the District Court, the Government's argument and the regulation on which it is based are contrary to the plain meaning of Section 1113. J.S. App. B at 34a. The statute mandatorily makes ineligible any person "who is required under section 3 [50 U.S.C. App. (& Supp. V) 453] to present himself for and submit to registration and fails to do so in accordance with any proclamation issued under such section." For those subject to 50 U.S.C. App. (& Supp. V) 453, Presidential Proclamation No. 4771 requires that registration must occur within 30 days of the eighteenth birthday. The provision is unambiguous and plainly requires registration within 30 days of the eighteenth birthday to establish eligibility for financial aid.

The Government's suggestion that "in accordance with" can be interpreted to mean "in the manner required" and thereby allow late registration is contrary to the natural meaning of the words. Appellants' Brief at 17. First, "in accordance with" can only mean in compliance with all the requirements of the Presidential Proclamation and not, as the Government suggests, in compliance with the act of registration but not with the mandatory timing of the registration as required by the same Proclamation. The Government's suggestion gives the words "in accordance with" a meaning that is unnatural and which they do not hold. It should be rejected by the Court.[3]

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[3] While it is unnecessary to reach the legislative history in the face of the clear wording of the statute, *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978), it is important to note that, at least in the House, an amendment proposed by Representative Simon would have allowed students to "complete and submit the necessary forms for registration *at the time of filing application* for such grant, loan or work assistance", 128 Cong. Rec. H4758 (July 28, 1982). (Emphasis added.) The amendment was defeated, evidencing an intent not to allow registration at the time of the loan application. *Id.* at H4769.

Second, the Government's own regulations concerning Student Assistance General Provisions, 34 C.F.R. part 668, which include the regulations interpreting Section 1113, use the phrase "in accordance with" or "in accord with" no less than six times. 34 C.F.R. § 668.2(b)(1), .14(2), .14(e)(7), .27(a)(7), .27(b)(2), and .28. Certainly, the Government cannot mean that in each instance any time limitations referred to should be ignored because "in accordance with" means compliance with some but not all the referenced sections. Such an interpretation would make nonsense of the regulations as the Government's argument makes nonsense of the English language.

Finally, the Government's regulations under Section 1113 were issued on April 11, 1983, after the issuance of a preliminary injunction in this case on March 9, 1983. On this issue, the regulations are a blatant attempt to change the law by administrative fiat in hopes of bolstering its constitutionality. Section 1113 is what is at issue here. The conflicting regulations cannot save it and should be ignored by the Court.

B. Section 1113 imposes punishment by depriving students of financial aid for higher education.

Turning then to the second element of a Bill of Attainder—punishment—this Court concluded in *Nixon v. Administrator of General Services, supra,* that there are three ways to analyze whether a statute imposes punishment—historically, functionally, or motivationally. The District Court reviewed the impact of Section 1113 in light of each of these criteria, concluding with respect to each that punishment had been imposed. J.S. App. at 12a-17a.

With respect to the historical test, the District Court found that deprivation of financial aid for higher education is

similar in effect to the punishment of prohibiting persons from certain vocations imposed in *Cummings*:

> The fact that the challenged statute deprives students of the practical means to achieve the education necessary to pursue many vocations in our society means only that the congressional means of effecting the deprivation is less direct;

Id. at 14a.

The District Court's finding is consistent with the concept of punishment in *Cummings* that "the deprivation of any rights, civil or political, previously enjoyed may be punishment" and carries out this Court's directive in *Cummings* that "what cannot be done directly cannot be done indirectly". 71 U.S. (4 Wall.) at 320, 326.

The District Court's analysis reflects the reality that a denial of financial aid is a denial of higher education, and denial of access to higher education closes off career opportunities and, indeed, entire professions. Title IV provides financial aid to almost two million students each year who are dependent on that aid for their education. For example, at the University of Minnesota Title IV aid constitutes 80% of all financial aid and, as is amply demonstrated by the anonymous plaintiffs, without aid they may not obtain education. In essence, the punishment is the same as in *Cummings* and *Ex Parte Garland*, where failure to give loyalty oaths denied those individuals ongoing careers as a minister and a lawyer. Here, the denial of education just as surely cuts off any access to those or similar careers.

Since legislation can be fashioned to impose new burdens and deprivations different from those historically recognized as punishment, the Court has also looked to the function of the statute to analyze "whether the law under challenge,

viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes". *Nixon*, 422 U.S. at 475-76. The District Court concluded that under such a functional analysis Section 1113 constitutes punishment. J.S. App. A at 16a. The District Court, following the analysis cited by this court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1962), set forth the factors it considered important as follows:

> The court believes that § 1113 fails the functional test. It imposes both a restraint and disability, assumes nonregistrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes. The court is also not persuaded that the purposes defendants allege are really alternative: under defendants' theory that the law does not punish nonregistration but encourages registration, every "punishment" could be renamed an "encouragement" thereby escaping the Constitution's proscription on bills of attainder.

Id.

Plainly, Section 1113 imposes a restraint and a disability by making certain individuals ineligible for federal financial aid. This change in their status is an affirmative disability in obtaining higher education and acts as a restraint on their ability to obtain jobs or advancement.

Second, Section 1113 assumes guilty intent or scienter in its definition of those made ineligible. That is, all persons who have not registered are assumed to be culpable (and thus must suffer denial of aid) even though they may have failed to register unintentionally.

Third, Section 1113 promotes the aims of retribution and deterrence by its very existence. This is probably best illustrated by the fourth reason, which is that non-registration is already a crime. The civil statute double punishes that group of non-registrants who are seeking higher education. This double punishment furthers the same retribution and deterrence values that the criminal statute itself does. In fact, like the statute in *Kennedy* which imposed "an additional penalty for a special category of draft evader" 372 U.S. at 169-170, Section 1113 imposes an additional penalty for a special category of non-registrant.

Finally, the primary purpose suggested by the Government is to "encourage" registration. Appellants' Brief at 26. As the District Court noted, this is simply a euphemism for "punishment" and every punishment could be redefined in this way. J.S. App. A at 16a. Moreover, as is fully demonstrated in the discussion of the congressional debate *infra*, it is highly doubtful that the suggested alternative purposes were the intended purpose.

The third and final recognized test of punishment is "strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish." *Nixon v. Administrator of General Services*, 433 U.S. at 479. The legislative record of Section 1113 is replete with statements that show a clear and unmistakable intent to punish those individuals who have not registered.

Perhaps the best example of this intent is found in the remarks of Representative Solomon, the author of the amendment, who stated that those who have registered "sorely resent the other 7 percent of Americans who have either

intentionally or unintentionally chosen not to register".[4] 128 Cong. Rec. H4757 (July 28, 1982). Representative Solomon's punitive intent is further illustrated by his remarks that he intended:

> [N]ot only to offer this amendment to this legislation, but as other legislation comes down the pike, . . . until every young man is deprived of any kind of Federal assistance unless he has obeyed the law . . .

Id.

In fact, virtually all the members of the House who spoke in support of the amendment indicated a similar intent to punish non-registrants. For example, Representative Mitchell commented "As the gentlemen said, the 500,000, it is a felony, they have violated the law, and they are not entitled to these educational benefits" 128 Cong. Rec. H4757 (July 28, 1982).[5]

The punitive intent of the amendment was recognized by several of the opponents of the measure, most notably by Representative Edgar:[6]

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[4] At two points in its brief, the Government suggests without complete quotation that Representative Solomon did not intend to punish unintentional violators. Appellants' Brief at 24 and 26. However, Representative Solomon's actual words, all in the past tense, do not indicate any such lenient attitude or any intent to treat unintentional violators any differently from intentional violators. Representative Solomon was obviously proud of the fact of his "equal treatment" of non-registrants, all of whom he intended to deprive of financial assistance.

[5] See also the remarks of Representative Mitchell: "I do not see any reason at all why they should get benefits from the country," 128 Cong. Rec. H4757; and Representative Hartnett: "The Chinese laundry operator had an old saying 'No ticket, no laundry.' I think the American people fully expect their young men, if they are going to receive financial assistance from this Government, to at least abide by the laws of this land." *Id.* at H4765.

[6] See also the remarks of Representative Moffet: "additional penalty" 128 Cong. Rec. H4758; Representative Patterson: "what is the intended punishment for those who do not need or require student aid assistance." *Id.* at H4760; Representative Goldwater, *id.* at H4761.

> I also question the premise that punishment should be used in order to induce young men to obey the law. This amendment has the obvious primary objective of increasing the number of men registered for the draft. However, *it also has a secondary, and more subtle, objective, which is to punish those individuals who do not register.*

Id. at H4760 (emphasis added).

The proponents did not attempt to disavow this punitive intent; indeed, they embraced it and rejected a less onerous version of the amendment which would have allowed students to register at the time of applying for financial aid or to declare their religious or moral objection to registration. 128 Cong. Rec. H4758.[7]

In the Senate there was less debate, but the intent of the major proponent, Senator Hayakawa, was clear. In a passage cited by the District Court, Senator Hayakawa said:

> It is a real travesty when those who will not register can turn around and apply for . . . educational benefits . . . . This [bill is] an important signal to every American that this Congress will not tolerate any willful, blatant rejection of the responsibilities which come with living in a free nation.

128 Cong. Rec. S4944 (May 12, 1982).

The motivation behind Section 1113 was to punish those who had not registered. The members of both the House and the Senate were keenly aware that criminal penalties already existed for non-registration. Despite those existing penalties,

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[7] The amendment was offered by Representative Simon and was later amended to exclude the religious or moral objection section. The amendment was defeated in both forms. 128 Cong. Rec. H4768, H4770.

they plainly wanted to impose added punishment. As Senator Durenburger commented, Section 1113 is "a case of overkill", 128 Cong. Rec. S4945 (May 12, 1982).

C. Section 1113 does not provide the protection of a judicial trial.

Finally, there can be no argument that Section 1113 does not provide the protections of a judicial trial. There is no provision for a trial. The procedure is for the college or university to deny the financial aid based on the statement of registration compliance and subsequent verification.

The only attempt at due process is an after-the-fact hearing in which the student bears the burden of proof. Section 1113(f)(4); 34 C.F.R. § 668.27. This provides almost none of the protections of a judicial trial and is clearly inappropriate where the real issue being adjudicated is the crime of failing to register. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

II. THE REQUIREMENT THAT AN APPLICANT FOR FINANCIAL AID FURNISH A "CERTIFICATE OF COMPLIANCE" AS PART OF THE FINANCIAL AID APPLICATION PROCESS VIOLATES THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This protection exists in every governmental proceeding, "be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *Murphy v. Waterfront Commissioner of New York Harbor*, 378 U.S. 52, 94 (1964). An individual

is entitled to the protection of the Fifth Amendment so long as three conditions are met. First, the individual must be involved in a governmental proceeding. Second, the individual must reasonably believe the information sought will be incriminating. *In Re Gault*, 387 U.S. 1, 47-48 (1967). Third, the government must in some fashion compel the individual's testimony. *Garrity v. New Jersey*, 385 U.S. 492, 498 (1967). In the present case the government contests only the existence of the third of these three conditions.

A. Section 1113 places an unreasonable burden on the exercise of a financial aid applicant's Fifth Amendment right to refuse to incriminate himself.

Since an unregistered applicant for financial aid, such as the appellees here, knows that a truthful disclosure of his registration status may prove incriminating, his only reasonable alternative is to invoke his Fifth Amendment right and refuse to answer that question. The assertion of the Fifth Amendment privilege will result, however, in an automatic denial of financial aid. This denial imposes an excessive penalty for the exercise of the applicant's constitutional rights. Section 1113 attempts to coerce financial aid applicants to waive their Fifth Amendment privilege and thus violates the privilege.[8]

This Court has long held that the government may not employ coercion of any sort to induce a person to surrender his privilege against self-incrimination. *Bram v. United States*, 168 U.S. 532, 542-543 (1897) ("[A] confession must not be

[8] Unlike *Minnesota v. Murphy*, 52 U.S.L.W. 4246 (February 22, 1984) appellees here face the certain imposition of a penalty if they choose to exercise their Fifth Amendment privilege. See Appellants' Brief at 30 n.14.

extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . ."); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The fatal constitutional defect in Section 1113 is that it deprives applicants of financial aid because, and only because, they choose to exercise their Fifth Amendment privilege.

This penalty is an excessive burden on the right to refuse to incriminate oneself. The inability to obtain funding for education deprives students of the opportunity to obtain an education and pursue their chosen livelihood. The Court has held repeatedly that a penalty of this sort may not be imposed on the exercise of Fifth Amendment rights. *See generally Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 80 (1973); *Uniformed Sanitation Men Association, Inc., et al. v. Sanitation Commissioner*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Lefkowitz v. Cunningham*, the Court explained the import of these cases as follows:

> These cases settle that the government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

Id. at 806.

The deprivation of educational benefits is an injury no less harmful than the loss of a job. *Cf. Garrity v. New Jersey*, 385 U.S. 493 (1967) (firing of police officers for refusing to waive their Fifth Amendment privilege); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (expulsion from and ban on holding political and party office for refusing to waive Fifth Amendment privilege). The long range economic consequences on an applicant are likely to be severe and lasting, certainly as severe as in other cases where a person has been afforded Fifth Amendment protection. *Cf. Lefkowitz v. Turley*, 414 U.S. 103 (1973) (licensed architects were protected by the Fifth Amendment even though penalty for assertion of privilege was only a temporary suspension from public employment). Section 1113 attempts to attach a substantial economic sanction to the exercise of the Fifth Amendment privilege against self-incrimination.

The government offers two main lines of reasoning to save Section 1113. First, the government asserts that no problem of legal compulsion arises because appellees have not been served with a summons or subpoena. Appellees could simply not apply for financial aid, the government asserts, and so avoid the necessity of providing any information. This argument exults the form of the procedure over the substance of its effect. The Court has held that the Fifth Amendment applies to every government proceeding. The protection of the Fifth Amendment need not be invoked by the magic of a subpoena or summons.

Further, the novel idea that one does not need the protection of the Fifth Amendment if the option is available of suffering economic loss rather than incriminating oneself is wrong. In many of the decided cases, the option of losing one's job was available as an alternative to perjury or self-

incrimination. See, *e.g.*, *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Lefkowitz v. Turley*, 414 U.S. 80 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In no case has the Court suggested that this option obviates the need for the Fifth Amendment.

The Government's second argument is a circularity. It argues that applicants who have not registered for the draft are not eligible for federal financial aid, need not bother to apply for it, and, therefore, need not worry about incriminating themselves. Appellants' Brief at 31. The argument assumes that the government may validly impose a condition on financial aid that requires surrender of an individual's self-incrimination privilege. Thus, the argument does no more than return to the question of whether the Government may impose a penalty on the assertion of the Fifth Amendment privilege against self-incrimination. See *Field v. Brown*, 610 F.2d 981 (D.C. Cir. 1979), *cert. den.* 446 U.S. 939 (1980). This court has held repeatedly that it may not.

Even if the Court accepts the government's assertion that a failure to register may be "cured" by late registration for the purposes of receiving financial aid, Section 1113 still remains fatally defective. In that case an applicant may be eligible for financial aid and also liable to prosecution for failure to register.[9] 50 U.S.C. App. (& Supp. V) 462. This situation poses an even crueler dilemma. An individual is faced with the choice of either foregoing educational benefits and the loss of preparation for a career or incriminating himself by applying for and receiving financial aid. The crucial evidentiary link is information required of the individual himself, and this information is protected by the Fifth Amendment

[9] See Appellants' Brief at 17 n.7 where the Government advances the novel argument that late registration is permissible for purposes of financial aid, yet remains a prosecutable crime.

privilege against self-incrimination. *Hoffman v. United States*, 341 U.S. 479 (1951); *Murphy v. Waterfront Commissioner*, 378 U.S. at 94 (White, J. concurring).

Turn and twist as it may, appellant cannot evade the simple logic of the Fifth Amendment. Section 1113 exacts a penalty if the appellees in the present case will not perjure themselves or waive their right under the Fifth Amendment to refuse to incriminate themselves. This is a choice which the Fifth Amendment forbids the government to force upon individuals. Section 1113 is therefore unconstitutional.

III. SECTION 1113 DISCRIMINATES BASED ON WEALTH AND GENDER WITHOUT SUFFICIENT JUSTIFICATION.

Though not dealt with by the District Court,[10] two genuinely troubling aspects of Section 1113 are the discrimination based on wealth and race that it imposes on the enforcement of the selective service laws and the discrimination based on gender that it imposes on Title IV. These unfair distinctions flow from the very nature of Title IV and serve to highlight the folly of utilizing Title IV as the enforcement mechanism for draft registration. Title IV is a gender neutral statute that distributes aid primarily based on need. Thus, aid is disbursed to individuals predominately from families who are the least able to support themselves and whose average family income is well below the national average. Recipients are disproportionately composed of minority group members.

Section 1113 perverts the lawful distinctions created by Title IV by making gender a criterion for financial aid and

[10] These claims were pled by the plaintiffs (Complaints, Counts 3 and 4, Joint Appendix at 14 and 27) and briefed to the District Court.

utilizing a draft registration enforcement tool that is pointedly aimed at minority persons and people without wealth. The distinctions are not supported by legitimate governmental purposes and are therefore unconstitutional.

A. The Additional Title IV Eligibility Requirement Imposed by Section 1113 has no Nexus to and Furthers no Purpose of Title IV.

The Fifth Amendment's due process clause prohibits federal defendants from engaging in discrimination so unjustifiable as to be violative of due process. See, *e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Bolling v. Sharpe*, 347 U.S. 497 (1975). In deciding Equal Protection issues under the Fifth Amendment, Fourteenth Amendment tests apply. See, *e.g.*, *Rostker*, 453 U.S. at 62 n.3.

When, as here, a statute makes a sex based classification, the Court applies a "heightened scrutiny" test, which requires that the classification be substantially related to the achievement of an important governmental objective. See, *e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976). Thus, to be valid, Section 1113 must serve an important governmental objective of Title IV. The purpose of Title IV is to make post-secondary education benefits available to students who are enrolled in eligible institutions and who maintain satisfactory academic progress. 20 U.S.C. §§ 1070(a), 1091(a)(1-5). Section 1113 does not aid this purpose.

The gender based distinction of Section 1113 furthers no purpose of Title IV. None of the other requirements for financial aid are gender biased and it is difficult to imagine a rationale for making financial aid more readily accessible for women than men. Plainly, men and women are equally deserving of education and should be treated equally through

gender neutral criteria. Sex discrimination in education programs receiving federal funds is also expressly prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.

Indeed, the rationale of *Rostker v. Goldberg*, 453 U.S. 57 (1981) in upholding the gender based distinction of the draft registration law itself compels the rejection of that distinction in Title IV programs. In *Rostker*, the Court reasoned that men and women are not similarly situated for the purposes of a draft or registration for a draft because combat restrictions are placed on women. 453 U.S. at 78. Men and women are similarly situated, however, for purposes of federally funded statutory higher education grants and loans under Title IV. Thus, Section 1113's gender based distinction cannot withstand constitutional scrutiny.

B. Section 1113 Provides for Enforcement of the Selective Service Act on a Basis that Unlawfully Discriminates Based on Wealth.

When analyzing a wealth based classification, the Court has required that the classification bear a rational relationship to legitimate legislative purposes. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 20-29 (1973); *U.S.D.A. v. Moreno*, 413 U.S. 528 (1973). However, the Court has carefully analyzed such classifications to determine if they impinge on a suspect classification. *Id.*

In the present case, Section 1113 utilizes Title IV as the enforcement vehicle for the Selective Service Act. By doing so, it picks up the wealth based distinctions legitimately and lawfully included in Title IV and makes them part of the enforcement policy of the Selective Service Act. While the wealth based distinctions are rationally related to Title IV, they bear no such rational relationship to the Selective Service Act.

Title IV aid goes predominately to individuals from less well off families. For instance, in two of the programs, Pell and SEOG, over 70% of the aid goes to recipients from families with incomes of less than $18,000 per year.[11] This is $5,000 per year less than the average family income for the United States. See Provisional Estimates of Social and Economic Housing Characteristics, PHC80-S1-1, U.S. Census Bureau.

As a result of the need criteria, Title IV aid is disproportionately distributed to minority group recipients. In one recent academic year, 49.5% of the recipients in the four major aid programs were from minority groups. Department of Education, Office of Student Financial Assistant Program Book, July, 1981 at 16. This compares with a 1980 United States population which is 83% white and 17% minority. Statistical Abstract of the United States. There are over twice as many minorities in the recipient group as would be expected based on the United States population.

In essence, Section 1113 by statute targets these persons for enforcement of the draft registration law. In fact, Rep-representative Solomon recognized and embraced this discriminatory effect in his remarks on the House floor:

> Now, maybe we are discriminating against the poor. And if we are, I guarantee I am going to come back

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[11] Department of Education, Office of Student Financial Assistant Program Book, July, 1981 at 9-10. The actual numbers are:

	Family Income		
	Less than $6,000	$6,000-$11,999	$12,000-$17,999
Pell	41.9%	21.7%	12.8%
SEOG	42.7%	20.8%	15.0%

> with legislation on this floor tomorrow and the next day and the next day and every day of this session with amendments that will prohibit any funds from being used for the Job Training Act if the are not registered, for any unemployment compensation insurance if they are not registered, and for any kind of taxpayer's money if they are not registered.

128 Cong. Rec. H4767 (July 28, 1982).

There can be no conceivable legitimate legislative purpose in enforcing the draft registration laws in this unfair manner. Since there is no connection between the classification and a legitimate legislative purpose, Section 1113 violates the equal protection guarantees of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

STEPHEN S. DUNHAM
WILLIAM P. DONOHUE
Attorneys for all other amici

RODERICK K. DAANE
Attorney for University of Michigan

PATRICIA EAMES
Attorney for Wayne State University

JAMES D. MILLER
Attorney for Macalester College Community Council

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v.
Minnesota Public Interest Research Group, et al.
and
Selective Service System, et al., Appellants
v.
Bradley Boe, et al.

Court: United States District Court
for the District of Minnesota

Counsel for appellant: Solicitor General, Keppel,William J.

Counsel for appellee: Suchman,E. Gail

Entry	Date	Note	Proceedings and Orders
1	Aug 19 1983	G	Statement as to jurisdiction filed.
2	Aug 19 1983		Record filed.
3	Aug 19 1983		Original record filed.
4	Jun 24 1983		Application for stay filed.
5	Jun 24 1983		Temporary stay granted by Blackmun, J., response requested - Due 6/27 by 1 p.m.
6	Jun 27 1983		Joint memorandum in opposition filed by MN Civil Liberties Union and MN Public Int. Research Group received.
7	Jun 29 1983		Application for stay granted by Court.
8	Jun 29 1983		Reply of Solicitor General received - 11:45 a.m.
10	Sep 12 1983		Order extending time to file response to jurisdictional statement until October 3, 1983.
11	Oct 3 1983		Brief amicus curiae of Swarthmore College filed.
12	Oct 4 1983		Brief amicus curiae of University of Minnesota, et al. filed.
13	Oct 4 1983		Motion of appellees MN Pub. Int., et al. to affirm filed.
14	Nov 16 1983		DISTPIBUTED. December 2, 1983
15	Dec 5 1983		PROBABLE JURISDICTION NOTED.
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17	Jan 18 1984		Order extending time to file brief of appellant on the merits until January 26, 1984.
18	Jan 19 1984		Brief amicus curiae of Boston University filed.
19	Jan 26 1984		Joint appendix filed.
20	Jan 26 1984		Brief of appellants Selective Serv. System, et al. filed.
21	Mar 1 1984		Brief amicus curiae of Swarthmore College, et al. filed.
22	Mar 3 1984		Brief amicus curiae of University of Minnesota, et al filed.
23	Mar 6 1984		Brief of appellees MN Pub. Int., et al. filed.
24	Mar 20 1984		SET FOR ARGUMENT. Monday, April 23, 1984. (1st case)
25	Mar 26 1984		CIRCULATED.
26	Apr 10 1984	X	Reply brief of appellants Selective Service System, et al. filed.
27	Apr 23 1984		ARGUED.